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No.

In the Supreme Court

of the

United States

October Term, 1984

Edwin C. Udey

Petitioner

vs.

United States of America

Respondent

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I: Can the Petitioner be convicted for harboring a federal fugitive and conspiring to harbor a federal fugitive when the sole evidence of his knowledge of the existence of a warrant is his association with the alleged fugitive and others who harbored him? Is guilt by association precluded by the First Amendment to the United States Constitution? [Peaceably assemble].

QUESTION II: Can the trial Court, when given strong evidence of the identity of the alleged fugitive:

A) Refuse to allow expert testimony to show Government bad faith destruction of identification evidence, especially when the Government has used expert testimony to prove identification;

B) Refuse to allow cross-examination of a Government witness to prove bad faith destruction of evidence. (Is this a violation of the right to cross-examination under the Sixth Amendment to the United States Constitution?);

C) Refuse to allow a layman with contradictory personal identification information to impeach the Government expert testimony with this information, and in effect find as a matter of law the identity of a corpse which is essential to the Government's case by finding that proof of bad faith, cross-examination, and impeachment, of the Government witnesses is irrelevant.

QUESTION III: How much good faith tampering with the jury can be tolerated before the Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution has been eroded to such an extent that a new trial should be granted?

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Constitutional Amendments

The First (1st) Amendment to the United States Constitution. Freedom to peaceably assemble.

The Sixth (6th) Amendment to the United States Constitution. Right to impartial jury, and to be confronted with witness against him (cross-examination).

The Fourteenth (14) Amendment to the United States Constitution. Due Process.

No.

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United States of America
Respondent

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To The Honorable Chief Justice of the United States, and to The Associate Justices of the United States Supreme Court:

Petitioner, Edwin C. Udey files this Petition for Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eighth Circuit which affirmed the trial Court's Judgement in a two to one decision and denied a Request for En Banc hearing with four dissenting opinions including the Chief Justice of the Eighth Circuit.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The opinion of the Court of Appeals has been officially reported. A copy of that opinion is attached as **Appendix A.** A copy of the En Banc dissent is attached as **Appendix B.** A copy of the opinion and judgement of the trial Court is attached as **Appendix C.** A copy of The Motion For A Stay Of The Issuance Of The Mandate is attached as **Appendix D.**

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and order of the Eighth Circuit Court of Appeals was submitted May 14, 1984 and filed November 7, 1984. Petitioner filed a Suggestion for Rehearing En Banc on the 16th day of November, 1984 based primarily on the area of law of concern to Chief Justice Lay in his dissenting opinion. On the 28th day of December, 1984, the majority of the voting circuit panel members voted not to grant an En Banc Hearing. There were four dissenters including Chief Justice Lay.

Jurisdiction to review the judgement of the Court of Appeals by Writ of Certiorari is vested in the Supreme Court of the United States.

STATUTES INVOLVED

This case involved 18 U.S.C. 1071 and 18 U.S.C. 371. The Petitioner was convicted of harboring and conspiracy to harbor the fugitive, Gordon Wendell Kahl.

SUMMARY OF THE CASE

This is a case involving the conviction for harboring, and conspiracy to harbor, of four (4) of five (5) Defendants tried, a fugitive named Gordon Wendell Kahl, herein called "Kahl". The Defendants were Arthur Russell, herein called "Russell"; Leonard Ginter, herein called "Ginter"; Norma Ginter, herein called "Norma"; Irene Udey, herein called "Irene"; and the Petitioner, Edwin Udey. Irene Udey was found not guilty by the trial Court. The author represented her as well as the Petitioner. Ginter and Norma were represented by Charlie Karr, a court-appointed attorney, herein called "Karr", and Russell was represented by Joe A. Izen, Jr., herein called "Izen".

Irene had been indicted on the basis of having visited the man

identified as Kahl, at the Russell residence and the allegation that Kahl had eaten at her home and she might have been there at the time. The other four (4) Defendants, including her husband, the Petitioner, were convicted.

A federal warrant was issued for the apprehension of Kahl on March 11, 1983 (see transcript, page 180).

Russell introduced his daughter, Karen Russell Robertson, herein called "Informant", to Ginter, (see transcript page 281, 442), who asked where the Petitioner and Irene were. (See transcript page 282).

Later that day, the Informant was introduced to a man she subsequently identified as Kahl, who told her he was Sam Louden; the kids could call him Uncle Sam. (See transcript page 293-295). This man stayed with the Informant, her father and children until May 30, 1983, (see transcript page 295).

Russell cooked for the man identified as Kahl, (see transcript page 454). Russell and Kahl and the Informant discussed the incidents that led up to the warrant. (See transcript 297-300).

Fingerprints belonging to Kahl were later found on movable objects in the Russell house which were given by the Informant to the Special Agent (of the Federal Bureau of Investigation herein called "F.B.I.") on the case, Jack Knox, code name Fort Knox, herein called "Knox". Knox paid the Informant TWENTY FIVE THOUSAND DOLLARS ($25,000.00) and other benefits to turn her father and others in. (See transcript page 300, 401, 406, 407, 982, 1054, 1055, 1059.)

The Petitioner visited the Russell residence on two (2) occasions, once with his wife (see transcript page 307 clarified transcript infra) and called the man alleged to be Kahl, Curley and said "You're a hero," (see transcript 307-308).

The Informant testified that Kahl visited the Udey residence on two (2) occasions (see transcript 308, 413) and that she saw a handwritten note on her father's stationary (Government's Exhibit #9) which read:

"Art, you come on out for supper, too. Leonard and Norma will be there. Give me a call as soon as you get home--Ed."

Several of the Defendants, not including the Petitioner, on May

30, 1983, discussed the F.B.I. wanted poster of Kahl and the search (see transcript 316, 322, 412).

Later that day, Edwin Udey was at the Russell residence. On that same day, (Edwin Udey was not present) a statement was made, "The F.B.I. is closing in." (see transcript 322, 323, 470, 471). The man identified as Kahl subsequently left.

On June 3, 1983, after a fire took place at the Ginter residence, a burnt human body was recovered from said residence. The body was burnt beyond recognization (see Government's Brief, page 4, for stipulation of this fact). (See transcript page 476, 507). The body was subsequently identified as Kahl. (See transcript 634, 636, 637) by Fahamy Malik.

After the confrontation, the Appellant stated to the Informant "There's another good patriot gone", (see transcript page 325), but that he has shot the sheriff. (See transcript 326, 406). A Bible was subsequently taken from the Appellant with a bookmarker and a notation at Acts 12:1-11, saying "Gordon Kahl delivered". (See transcript 988, 989 and Goverment Bible Exhibit #12).

The Udey (Petitioner's) residence was searched for finger prints of Kahl and none were discovered. (See transcript page 1064, Louis Hupp.)

At the trial, Judge Franklin Waters, ruled that cross-examination of one of the Government's witnesses, Dero Downing, to attempt to show the Government's bad faith in burning the corpse beyond recognition was not relevant. (See transcript page 556-560). Petitioner then showed for purposes of appellate review that the Government burned the body to prevent identification. (See transcript page 550-552).

The trial Court also ruled that the issue whether or not the Government intentionally set the Ginter residence a flame and thus, burned the corpse was not relevant. The chemist and arson investigator hired by the defense were not allowed to testify. [See transcript page 1220 and 1222, (motions adopted by all Defendants), 1228-1230].

STATEMENT OF THE CASE

QUESTION I.

Insufficiency of evidence to show knowledge of Federal Warrant

"The Court will be frank to admit that the evidence in this case against Mr. Udey was the weakest of all."

"The Court believes that Mr. Udey was involved in this, EVEN THOUGH THE EVIDENCE IS NOT AS STRONG AS IT COULD BE AND SHOULD BE, PERHAPS". Judge Franklin Waters. (See page 24, of the Sentencing Hearing).

Petitioner agrees that the evidence is not as strong as it should be, so did the dissenting opinion of the 8th Circuit's Chief Justice joined by three (3) other Circuit Judges. (See Appendix "B").

One of the critical issues that the Government must prove beyond a reasonable doubt, and perhaps the most critical issue, in order to sustain a conviction for the offense of harboring, or the offense of conspiring to harbor, is knowledge that a warrant had been issued.

This knowledge is an essential element of the proof, that the Government must demonstrate beyond a reasonable doubt, pursuant to 18 U.S.C. 1071, which provides:

> "whoever harbors or conceals any person for whose arrest a warrant has been issued under the provisions of any law of the United States, so as to prevent his discovery, after notice or knowledge of the fact that a warrant has been issued ..."

see *U.S.* vs. *Foy*, 416 F.2d 940, (7th Cir. 1969), has committed the offense of harboring. A careful examination of the evidence will demonstrate that there is no evidence whatsoever other than the mere association with persons convicted of the offense of harboring and conspiring to harbor, and association with the alleged fugitive, that would allow anyone to come to the conclusion that the Petitioner knew of the federal warrant.

As Judge Franklin Waters tells us, and as we learn from a careful reading of the record, the "evidence" against the Petitioner is perhaps not what it should have been, that being, nine (9) Evidenciary Items (herein abbreviated E.I. 1-9):

E.I. #1. Mr. Ginter asked where the Udeys were. (See transcript, page 282, line 24).

E.I. #2. Udey shook hands with Kahl and called him "hero"

and "Curly". (See transcript page 308).

E.I. #3. The Informant "recalls" Kahl went over to Petitioner and Irene's (Co-Defendant found innocent) home twice. (See transcript page 308). The Informant had no personal knowledge of either dinner or the people who have attended. Her "recollection" was based on the other Evidenciary Items described herein).

E.I. #4. The Petitioner asked if "Gordon" could come over for supper. (See transcript page 309, line 25).

E.I. #5. A note was found in the house on the table clipboard (see Government's Exhibit 9) on Russell's letterhead which stated:

"Art, you come on out for supper, too. Leonard and Norma will be there. Give me a call as soon as you get home. Ed." (No reference made to Kahl and no date).

E.I. #6. The Informant said Russell told her he was going to the Udeys. (See transcript page 313).

E.I. #7. That night Russell returned with Kahl.

E.I. #8. Udey's Bible has a passage in which Kahl's name was hand-written at Acts 12:1-11. (See transcript page 988 and Government Exhibit #12).

E.I. #9. After the burning of the Ginter residence and the recovery of the corpse subsequently identified as Gordon Wendell Kahl, the fugitive, a conversation took place between the Informant and Petitioner in which the Informant said, "there is another good patriot gone", (see transcript page 325), and the sheriff had been shot. (Transcript 326, 406).

In more than 1,000 pages of testimony taken over approximately two (2) weeks trial time, this is the sum total of the "evidence" against the Petitioner, Ed Udey, which was used to demonstrate that the Appellant knew that the man alleged to be Kahl was in fact a fugitive from justice as that term is defined under term 18 U.S.C. 1071, in other words; that there was a federal warrant out for his apprehension, and that the Petitioner knew of it. These Evidenciary Items can be boiled down to two (2) categories.

CATEGORY 1. Statements, observation, and speculations of the Informant.

CATEGORY 2. (a). A note on a clipboard that does not include Kahl.

(b). A name hand-written in Petitioner's personal Bible at Acts 12:1-11.

For purposes of appeal, an examination of the evidence should be made in a light which takes the testimony in favor of the Government by the Informant at her word, regardless of her creditability, and, stretches the current case law to its limit in order to support the jury verdict of guilty. Assuming arguendo, for purposes of discussion of ISSUE I, that the identity of the burnt corpse identified as Gordon Wendell Kahl, was in fact, Gordon Wendell Kahl, as a matter of law, these nine (9) elements of evidence utilized to demonstrate knowledge of the warrant needs to be carefully examined and after examination re-examined in light of the complete testimony of the source of the evidence, the Informant, who admits that she personally (the sole witness against the Petitioner) has little concrete reason to suspect the Petitioner. (See transcript page 413, line 14, page 417, line 18).

Ginter asked where the Udeys were. (E.I. #1). This proves that Ginter has an association of some type with the Udeys and since Ginter is a convicted harborer and co-conspirator of Gordon Wendall Kahl, the Petitioner has now been proven to have had an association with said harborer. The Petitioner also had an association with another convicted harborer and conspirator, seventy-five (75) year old Arthur Russell. (E.I. #4, #5, #6). The evidence clearly demonstrates this association. Not only was the Petitioner clearly associated with two (2) convicted harborers and conspirators to harbor Russell and Ginter, he also shook hands with the alleged Kahl, and apparently liked him because he called him "hero". (E.I. #2, #3, #4, #8, #9). After his death and the stipulated publicity, (which told the entire world the deceased was the fugitive Kahl) the Petitioner wrote Kahl's name in his Bible at Acts 12:1-11. (E.I. #8 and Government Exhibit #12).

He also asked if Gordon "could come over for supper". (E.I. #4). The evidence does not demonstrate that the supper took place, (infra).

In all Federal Circuit Courts of Appeals examined, and the

Supreme Court, precedent dictates that "mere presence of a Defendant at the scene of the crime or mere association with members of a criminal conspiracy is not sufficient to prove a conspiracy ...." [see *U.S.* vs. *Brown*, 584 F.2d 252, (8th Cir. 1978), *Bailey* vs. *U.S.*, 416 F.2d 1110, (Dist. of Columbia Cir. 1969), *U.S.* vs. *Baker*, 499 F.2d 845, (7th Cir. 1974), *U.S.* vs. *Duckett*, 550 F.2d 1027, (5th Cir. 1977)] "Guilt may not be inferred solely on the basis of Defendants presence or association with members of the conspiracy." [(See *U.S.* vs. *Ward*, 703 F.2d 1058, (8th Cir. 1983).]

The basic reason for the non-conviction by association was clearly expressed in *U.S.* vs. *Baker*, 499 F.2d 845, (7th Cir. 1974) when "the United States Attorney at oral argument argued that Vela (the Appellant) 'shouldn't associate with these people'." The clear argument of the Government was guilt by association, and the 7th Circuit rejected the argument. It is an unconstitutional argument that could preclude freedom to peaceably assemble and that would have warmed "McCarthy's" heart.

The Court in the 7th Circuit opinion, supra, cited the 2nd Circuit which in *U.S.* vs. *Stromberg*, 268 F.2d 256, (2nd Cir., 1959, cert. denied 361 U.S. 863), ".... mere association with conspirators is insufficient basis for a finding of participation". The 8th Circuit Court in *U.S.* vs. *Kelton*, 446 F.2d 669 (1971), in an opinion authored by the dissenting author in the instant case, Chief Justice Lay, and two (2) of the other three Judges who also dissented, Justice Heaney and Bright, affirmed other decisions that "the Courts have the responsibility to make sure that mere speculation is not permitted to substitute for proof in such cases." (Quoting and endorsing *U.S.* vs. *Barber*, 429 F.2d 1394, 1397 (3rd Cir. 1970).

The Court also stated "nor is mere presence at the scene of crime alone sufficient to sustain the burden of proof the Government bears". (Also quoting Supreme Court decisions, *U.S.* vs. *William*, 341 U.S. 58, Supreme Court, and *Hicks* vs. *U.S.*, 150 U.S. 442, Supreme Court.

There are no cases in any of the Circuits which allow the mere association of an individual to show proof of the knowledge of the existence of a warrant.

The general rule of the Circuits is to maintain an extremely strict standard for proving that the Defendant had personal knowledge of the warrant coupled by an overt act to conceal. In *U.S.* vs. *Foy*, 416 F.2d 940, (7th Cir. 1969), Foy lied to the police and told them that the fugitive was not in his home. The Appellate Court reversed a finding that failure to disclose the location of the fugitive is the type of assistance contemplated by the harboring statute. Refusal to admit police officers into the apartment where the fugitive was, would have constituted the act of harboring (assuming that knowledge of the warrant had been given) (see *U.S.* vs. *Biami*, 243 F.2d 917).

In *Kelton*, supra, the 8th Circuit also determined that there was no evidence on the record that the Defendant knew that there was to be a robbery or that the Defendant helped in any way to carry it out. There was a great deal of circumstantial evidence. He was present at the time the robbery was planned. He handled a gun in his apartment prior to the robbery. He handed a shirt to one of the boys before the robbery and although he was unemployed prior to the robbery, he had money in his possession after the robbery. The primary evidence used to convict him was guilt by association. This guilt by association was insufficient to uphold the verdict. In *U.S.* vs. *Magness*, 456 F.2d 976, (9th Cir. 1972), the association of the Defendant with the fugitive, coupled specifically with the Defendant actually being told that there was an outstanding federal warrant for the fugitive and actual overt acts of concealing might have shown "the conduct prescribed by 18 U.S.C. 1071 .... harboring or concealing a person for whose arrest a warrant or process had been issued after notice or knowledge of the fact that a warrant or process had been issued"; but none of Magness' conduct prior to January 4, 1971 when he first learned of the outstanding warrant for the arrest of the fugitive could constitute an offense of the statute. (Although it might throw light on Magness' conduct after he gained such knowledge).

Magness was specifically told of the warrant and yet, the evidence was not sufficient to convict him, because at the time he committed the overt acts, there was no evidence other than mere association that he knew of the warrant. There was only speculative evidence that Magness had given a warning to the fugitive that he was in danger of being apprehended. The

Appellate Court disregarded the pure speculation on the part of the Government.

In the instant case, the speculative "overt acts" restated herein, did not follow evidence of knowledge of a warrant, other than mere association, that would show that Ed Udey had knowledge of the existence of a federal warrant.

The various Court interpretations of the harboring statute can be summarized: Allow the federal officers or marshalls to announce to individuals that there is a federal warrant for an individual. After announcing to the individuals that there is a federal warrant, the person who has personal knowledge of the warrant, may no longer assist in hiding said individual. Until that knowledge is gained or there is substantial evidence that that knowledge was in some way transmitted to the Defendant, a case of harboring cannot be proven. It is obvious that the Courts do not want to allow a "McCarthy" type situation to reoccur in the United States in which people are branded guilty on the basis of their guilt by association with other persons. Association alone is not adequate, in fact, even substantial association alone is not sufficient (see *U.S.* vs. *Brown*, supra). Even during the scandalous "McCarthy" times, while the politicians in Congress ignored due process, the Courts were not a party to the outrageous crime of finging guilt by association.

In Brown, (supra):

1) Evidence demonstrated that Cleo Brown, the Defendant, associated with known conspirators and was present on the night of the arrest of the conspirators;

2) Cleo Brown had suspicious items on his person such as large sums of money at the time of the drug purchase without any means of explaination;

3) There were handwritten notes using such terms as "blow" which an expert testified could refer to a quantity of heroin or cocaine;

4) Cleo had a teaspoon on his person which could have been used for dividing drugs;

5) He was twice present at the apartment of his brother, a drug dealer, after the approximate time that another convicted

conspirator completed drug sales. He associated with drug salesmen and was related to a drug salesman. The jury could not withstand such suspicious conduct and relationships and thus convicted him.

In reversing the jury decision, the Court reaffirmed the principal that it had previously upheld in *U.S.* vs. *Graham*, (see, 548 F.2d 1302).

> "The necessity for proving facts other than presence has been explained as an essential safeguard against the ever present danger of assuming the complicity of all in attendance whenever group activity is involved ... the Courts have the responsibility to make sure that mere speculation is not permitted to substitute for proof in such cases."

In the instant case, the Government wants to take less circumstantial evidence and find an overt act by association as well as impute for the first time in any Circuit in the United States, and contrary to the Supreme Court's clear holdings (supra) on guilt by association, actual knowledge of a federal warrant without any direct evidence and on a minimal amount of speculative circumstantial evidence supplied primarily by a co-conspirator, the Informant, whose beliefs were based on her personal speculation. (See transcript page 413, line 13 through 16 and page 417, line 15, page 418).

In *U.S.* vs. *Ward*, (supra) the Court stated:

> "... guilt may not be infered solely on the basis of Defendant's presence or association with members of the conspiracy."

In the instant case, there was no direct evidence that any of the conspirators were specifically told by a law enforcement officer that a federal warrant existed for the arrest of Kahl. However,there was extremely convincing evidence that some of the conspirators knew of the warrant which evidence was supplied by the Informant (see transcript page 316, 322, 412). There was no testimony however by the Informant, to indicate that the Petitioner had such knowledge.

The Petitioner does not contend however, that in the instance of the other convicted Co-Defendants, there was an insufficiency of

evidence to prove that they knew the exitence of a federal warrant. In fact, the evidence if believed, was substantial enough to sustain a conviction on that portion of the Government's burden (against Ginter and Russell but nor Norma) which was to prove beyond a reasonable doubt the knowledge of a warrant. There are cases decided (although not many) in which the direct act was not necessary to prove knowledge of the warrant. The evidence in those cases has never been mere association or sympathy. There is not a single reported case in the United States of American that has allowed mere association and sympathy to demonstrate knowledge of the existence of a warrant.

The 8th Circuit had what the undersigned believed prior to the decision in *U.S.* vs. *Udey*, very consistent positions on both ends of the scale; in other words: consistent positions showing that mere association is not sufficient and yet, actual direct evidence demonstrating that the Defendant knew a federal warrant existed for the arrest of the fugitive can be proven by indirect evidence. In what is undoubtedly a landmark decision because it was by the Government in its two (2) briefs and oral argument, *U.S.* vs. *Bissonette*, 586 F.2d 73, (8th Cir. 1978), [which also quotes *U.S.* vs. *Giampa*, 290 F.2d 83, 83 (2nd Cir. 1961)] the Court expressed its view that direct proof of the knowledge of the warrant is rarely available. In that case, the Court examined whether Bissonette, had harbored the fugitive Eagle.

Bissonette went to an F.B.I. Agent and asked if there were any outstanding warrants against two (2) fugitives, Allen & Eagle. The agent asked Bissonette if she knew where the persons were and told her that there was a parole violator warrant existing. Two (2) days later, federal and tribal law enforcement officials arrested Allen (one of the two persons Bissonette had inquired about) at the home of Bissonette on September 14. Bissonette called Allen up from the basement but did not inform the officials that the other fugitive was there. Later, the F.B.I. Agents were informed that Eagle had been staying there too, and in fact, Eagle was found in the attic between the rafters and arrested. Bissonette was convicted. The Government had proved that she knew about the warrant. A Government Agent had told her about the warrant and the circumstantial evidence showed that she had had actively

concealed Eagle. They had asked her if the two fugitives were there and she had produced only one, concealing the fact that the other fugitive, Eagle, was also in the home. Her "behavior at the time of Allen's arrest; by calling Allen from the basement, Bissonette forestalled the possible search at the house that would have resulted in Eagle's discovery and arrest." (See Bissonette supra).

In another important case, demonstrating only circumstantial knowledge of the warrant but not showing that anybody had told the Defendant, that a warrant existed, see [*U.S.* vs. *Stephenson*, 474 F.2d 1353, 1355 (5th Cir.)], the Court ruled, "a trial Judge should not permit a case to go to the jury if the evidence is so scant as to allow the jury merely to speculate .... of the Defendant's guilt."

In another words, the Motion for Acquittal must be granted when the evidence viewed in the light most favorable to the Government is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged. In *U.S.* vs. *Frol*, (supra) "where the evidence is equally strong to infer innocence of the crime charged as it is to infer guilt, the verdict must be one of not guilty and the Court has a duty to direct an acquittal".

In *U.S.* vs. *Giampa* (infra), the Defendant called out to the fugitive "run Nick, it's the F.B.I." This case is relied on in the Bissonette decision. This is the type of indirect evidence the Courts allow to show knowledge of a warrant, not association.

The association with these persons shows no knowledge of the warrant and shows no convincing overt act which could be construed any way as assisting in the conspiracy or actually harboring. If the Court chooses to be convinced, nevertheless the "convincing" evidence all took place without the predicate of Magness being laid, that being prior evidence of knowledge of the warrant. The obstacle of proving knowledge of the warrant by the Petitioner was never overcome

There was a substantial effort on behalf of the Informant to prove that at least two (2) dinners took place at the Udey residence. A phone call was made inviting Kahl to come over for dinner. A note that may or may not have been intended for Arthur

Russell to join a dinner at which Kahl was present was found. The time of the note was not placed in context with the next series of events that the Informant testified to. Those series of events were; Kahl was missing from the house when the Informant came, and her father left [speculatively after seeing the note (Government's Exhibit 9)] driving in the geographical direction of the town in which the Udey home may have been located, (the evidence doesn't show this) and returned that night with Kahl. This vague and speculative circumstantial evidence was intended to prove that Kahl had dinner at the Udey residence with the Informant's father.

The Informant's answers to a question on direct to show this were:

"I was coming home from Gassville and it was at night. It was getting dark. And I saw my father's car and when I got to the house, neither my father nor Mr. Kahl were there."

(See transcript page 315).

"Q: What direction was it going?

A: It was going toward Gassville."

(See transcript page 316). We are asked to assume the Petitioner's home was in Gassville (Petitioner's home is actually in Cotter), the Informant's father wanted to reach Gassville and his intended and actual destination was the Petitioner's home in Gassville.

Kahl was never seen in a Udey vehicle. There were no observations that Kahl had left the house and gone toward the Udey residence. There was no evidence that a dinner actually took place at the Udey residence other than the Informant's testimony which she later admits is based on the circumstantial evidence already discussed. "No transaction was observed". (See Frol infra).

In *U.S. vs. Frol*, 518 F.2d 1134, (8th Cir. 1975), the Appellant found that:

> "the jury could only speculate as to who might have been in Frol's car when it appeared at the bowling alley on the night in question. Moreover, even if the jury could properly infer from the evidence that Frol was in the car, the Government has presented no direct or circumstantial evidence from which the

jury could find beyond reasonable doubt that Frol was in actual or constructive possession of the heroin or had passed it to Ellison. No transaction was observed."

In that case, heroin dealers had entered and left the car and had made a transaction in the vicinity where the car had been parked. The car shortly thereafter was observed driven by the Defendant, Frol. Only a short period of time elapsed between the transaction and the observance of Frol in the car, but this was insufficient to maintain a conviction.

In the instant case, if we allow the speculation of the Informant to go full circle and if we ignore *U.S. vs. Frol*, (supra) the Governement would have us construe that a dinner took place because there is evidence that the dinner was offered and Karen Robertson discussed meals at the Udeys with Kahl. [(See transcript page 314), (but did not discuss whether or not any meals had ever been taken at the Udeys).] The Government did not elaborate on direct whether or not the meals had been taken, whether they were discussing the possibility of speculative future meals or whether Karen Robertson, who had eaten at the Udey home on numerous occasions, was merely recommending the Udey home to Kahl as a place at which she had enjoyed excellent meals, or perhaps, warning Mr. Kahl that he should not eat at the Udey home (since she had seen the note and coupled with the phone call speculated he was considering going over there), because the food was not very good and she personally did not enjoy the company. (See page 407, line 16 and supra, Karen Russell Robertson states she doesn't like the Udeys).

Even if we indulge the Government and the Informant and believe that a speculated meal took place, this does not prove that the Petitioner knew a federal warrant existed for the arrest of the gentleman identified as Gordon Wendell Kahl. This evidence is not even mere association. It is the speculation of mere association.

Reading the opinion of the 8th Circuit and the dissenting opinion, it is clear that it was not the intent of the 8th Circuit to overrule itself on *U.S. vs. Brown*, *U.S. vs. Frol*, *U.S. vs.*

Harshaw, and *U.S. vs. Ward*. Instead, it appears that the majority in rejecting the request for an En Banc re-hearing, wanted to rely on the testimony of the Informant that there was a conversation on May 30, 1983, at which time, several of the co-conspirators in the conspiracy to harbor Gordon Wendell Kahl, discussed the possibility that the F.B.I. was closing in on Mr. Kahl. If in fact, this occurred, it would be the least amount of proof utilized of any reported United States case to sustain a finding of the knowledge of a federal warrant by an accussed person. In *Giampa* (supra) which was cited in Bissonette (supra) as authority an actual warning to the fugitive by the Defendant was given.

The discussion that the F.B.I. was closing in coupled with the fact that a fugitive was present at the time the discussion took place could be used if this Court chose to radically expand Bissonette (supra) to come to the conclusion that an outstanding warrant existed. However, the uncontroverted record uncategorically shows the Petitioner was not present.

There is apparently a dispute however, by the Justices in the 8th Circuit as to whether or not the Petitioner heard or was present at the time that the F.B.I. statements were made. It is the position of the dissenters that there was no evidence that the Petitioner heard these statement. The sole evidence that the Petitioner may have heard these statements rest with the testimony of the Informant which is further examined, (infra).

The conversation on which the Petitioner was convicted took place on May 30. The prosecutor questioned the Informant concerning two (2) different times on that date. During the first portion of direct examination of the Informant by the Government, reguarding events that occurred on May 30, Memorial day. The Informant's response was:

> "A: I had some stuff in the back of my pickup that I needed to unload and Mr. Ginter and Ed Udey were at the house and I went to get gas and unload the pickup. And when I was leaving, they all went into the motor home to talk".
>
> "Q: Now, when you say, 'they all went in the motor home to talk,' name the people you're talking about, please."

"A: Mr. Kahl and Mr. Ginter and, I believe, Mr. Udey also."

(See transcript page 322).

There is no testimony about what occurred in the trailer. The witness cannot state under oath anything but her belief that Ed Udey went into the trailer, (there is no evidence the conspiracy took place in the trailer and if it did, no evidence the Petitioner played any part other than an observer). The Petitioner associated with all of these people. There is reasonable doubt on the part of the Informant as to whether or not the Appellant went into the trailer with Mr. Kahl, but, even if he did, this would only be evidence of association and not evidence of knowledge of a warrant.

Udey said "another good patriot gone", (see transcript page 325, line 25.) He said that Mr. Kahl had shot the Sheriff, (see transcript page 326, line 2), but these events (E.I. #9) are not relevant having taken place after the alleged harboring.

Of course, as anyone who read the medical report (see Government's Exhibit #_____) can tell on examination of the evidence which was offered at the preliminary hearings for the State capitol murder trial, Mr. Kahl did not shoot the Sheriff. (See Government's Exhibit _____). This erroneous statement of the Petitioner was apparently picked up from rumors or the newspaper but not from anyone with personal knowledge. Everyone with personal knowledge knew that Gordon Wendell Kahl did not shoot the Sheriff and in fact, didn't fire any rounds prior to being shot in the back of the head with a 44 Magnum.

The only other proof of knowledge of a warrant also exonerated the Petitioner.

(See transcript page 321, question by Mr. McCord):

"Q: Ms. Robertson, I believe your previous answer had been that they had discussed this wanted poster, Government Exhibit #3. Who do you mean by "they"?

"A: Mr. Wade, Mr. Ginter, and Mr. Kahl."

Other than the vague beliefs and other speculative circumstantial evidence offered by the Informant, and Government's Exhibit "9" and Exhibit "12", (which will be examined more carefully, infra)

unless we consider the dinner itself, there is not even evidence of a single overt act. On the contrary, the Informant's testimony in many instances clearly exonerates the Petitioner.

Question by Minns on cross-examination, (see page 395, line 25).

"Q: I would like to bring you back to the portion of your testimony regarding Gordon Kahl in which there was talk that the F.B.I. was closing in. Was it the talk that the F.B.I. was closing in on Mr. Gordon Kahl?"

Line 6, page 396. "A: I did not state that Mr. Kahl was having a conversation with my father, sir."

Line 8. "Q: Okay. Please tell me who was having this conversation."

Line 9. "A: I believe that it was Mr. Wade, Mr. Ginter, and Mr. Kahl."

Line 10. "Q: You're not certain?

Line 11. "A: I do not believe my father was entered into this conversation."

Line 13. "Q: So you have identified three people who are talking to him about the F.B.I. closing in, Bill Wade, Mr. Ginter, the gentleman over to the left here --"

Line 16. "A: Yes, sir."

This conversation established the fact that the Udeys did not participate in this "F.B.I. is closing in" conversation. The dialogue continued to exonerate the Udeys.

(See page 412, line 16). "Q: Please tell me about your very small part."

Line 17. "A: They were talking about the F.B.I. closing in and then they went on to discuss guns and ammunition. And I asked them where they were going to get the guns and ammunition."

Line 20. "Q: Is that the only part you played, that one line?"

Line 21. "A: I asked them if they were going to use CSA and get their guns and ammunition from them."

Line 23. "Q: Are those the only lines you uttered in this conversation, two lines?"

Line 25. "A: I believe so, sir."

(Page 413, line 6). "Q: Was Irene Udey present at that time?

Line 7. "A: No, sir."

Line 8. "Q: Was Edwin Udey present at that time?"

Line 9. "A: No, sir."

Line 13. "Q: What did you hear Edwin Udey plan about any of this?"

Line 14. "A: The only thing I know of Mr. Udey doing in this was inviting Mr. Kahl over for supper and coming over and getting him and taking him over for supper."

Note: She has already testified that her knowledge of this is from the circumstantial evidence and that she has no personal knowledge of the dinner.

(See page 414, line 7). "Q: This conspiracy, what part did you hear Edwin Udey play?"

Line 8. "A: I have just stated."

Line 9. "Q: Other than this dinner that you've described, that's it; is that correct?"

Line 11. "A: And Mr. Udey knew who he was and knew he was there."

While the Informant told us that Ginter, Russell and the Informant knew Kahl was evading a warrant, she never told us how the Petitioner learned, if he did, about the warrant.

The Informant up to this point, had not testified to any act that would demonstrate to her that the Petitioner knew the man that she was harboring was in fact, Gordon Wendell Kahl.

On page 417, line 15, cross-examination by Minns. "Q: Thank you. Mr. Ed Udey, do you feel he conspired to hide Uncle Sam in your home?" (Uncle Sam was one of the names given as an alias for Gordon Kahl during the testimony).

Line 17. "A: All I know is that Mr. Ginter asked where the Udeys were."

(See page 418, line 3, cross-examination by Minns. "Q: Do you have any reason, from your personal knowledge, to believe that Edwin Udey had anything to do with any conspiracy to hide this man in you home?"

Line 6. "A: Not in my father's home, no."

Line 7. "Q: Anywhere else?"

Line 17. "A: Well, then, no, because it wouldn't be from my personal -- it would be from what someone said. And it wasn't to me."

Line 29. "Q: Thank you. So your previous sworn testimony about Mr. Edwin Udey is from what other people have told you, not from what you know personally?"

Line 23. "A: And from what I have overheard, sir."

Line 24. "Q: Overheard from Mr. Udey?"

Line 25. "A: No, overheard from Mr. Ginter asking my father, sir." (See brief, page 4).

Where are we now in the Government's case? The Informant's personal knowledge is that the Petitioner did not harbor Kahl in the Russell residence. Based on this, the Petitioner was convicted of harboring Gordon Wendell Kahl in the Russell residence.

There is no re-direct to change this testimony and it is clear from the testimony that the Petitioner was not present at the time that "the F.B.I. is closing in" statement was made. The Informant who had serious doubts about whether or not the Petitioner went into a trailer with the fugitive had no doubts that the Petitioner was not present when the statements were made.

The Government indicated that these statements were heard or observed by Mr. Udey, the Petitioner. The undisputed testimony is that the Petitioner was not present at any time in which the warrants were discussed. In fact, without "the F.B.I. is closing in" statement and without the television statement in which the warrant was discussed with Kahl, there would be no evidence to provide for the conviction of any of the Defendants. There must be some type of evidence to show knowledge of a warrant. *In U.S. vs. Baker*, 499 F.2d 845, (7th Cir. 1974), (supra), the Court after having carefully examined suspicious guilt-by-association evidence concluded that:

> "Although the United States Attorney states in his brief that all three 'discussed the purchase and the dealing in narcotics and dangerous drugs in general,' there is no evidence that Vela participated in the discussion. The evidence merely shows that Vela was present and (he lived there) and engaged in small talk."

The case was reversed against Vela. In the instant case, not

only does it not show that the Petitioner participated in the conversation, the evidence clearly shows the Petitioner wasn't even present when the conversation took place. In *U.S. vs. Hogg*, 670 F.2d 1358, (4th Cir. 1982), the Court found that:

"…. there was no evidence introduced that Robinson was present or ever learned of this conversation, nor more generally that he ever knew (the fugitive) Miles had escaped from prison."

The Court stated that: "we agree that there was insufficient evidence that Robinson knew a federal warrant existed. Such knowledge is an essential element of the federal crime of harboring 18 U.S.C. 1071, and is equaly an essential element of the crime of conspiring to harbor under 18 U.S.C. 371." [Citing *U.S. vs. Bekowies*, 432 F.2d 8, (9th Cir. 1970)]. Robinson let the fugitive stay at his house. Robinson lied to officials about his car.

> "The only other possible basis of an inference that Robinson knew of a warrant would be his association with Miles, Honeycutt, and the other Defendants, who, as we have held the jury permissible found, …. Robinson indeed lived with Drose for several months…."

We think that no jury could reasonably find beyond a reasonable doubt from this pattern of intermittent association with persons possessing knowledge that Robinson acquired the same knowledge. In that case, the Court cited the prevailing case, *U.S. vs. Giampa*, 290 F.2d 83, (2nd Cir. 1961), (supra), in which the conviction against Giampa was sustained. Giampa signed the lease in his own name. He brought groceries to the apartment, so the fugitive need not appear in public. Finally, and perhaps most importantly for infering knowledge, he barred federal officials from entering the apartment while yelling "run Nick, it's the F.B.I." The Court found that the Defendant knew his friend was a fugitive from justice even though he had not been told about the warrant.

In the instant case, there is no "run Nick" evidence.

The evidence show only that the Petitioner associated with harborers and might have had the opportunity to learn of the existence of the Federal warrant. The Informant upon whose testimony the conviction relies, sums it up almost as well as Judge Waters did:

"The only thing I know of Mr. Udey doing in this was inviting

Mr. Kahl over for supper and coming over and getting him and taking him over for supper."

(Transcript page 413, line 14.)

QUESTION II

Bad Faith Destruction of Evidence

[The Sixth Amendment, Right to Cross-Examination and Fourteen Amendment, Right to Due Process]. This issue is concerned with the identification of the corpse alleged to be Gordon Wendell Kahl. The 8th Circuit dissenters did not support the Petitioner on this argument.

It is stipulated by the Petitioner that there was substantial and convincing evidence that the corpse identified by Fahamy Malak on behalf of the State of Arkansas and on behalf of the Federal Government was in fact, Gordon Wendell Kahl, the fugitive who was the subject of the search warrant upon which the convictions for harboring and conspiring to harbor were sustained. There is thus adequate evidence in the record, to sustain the finding that the burnt corpse was Gordon Wendell Kahl.

There was also evidence which tended to show that he was not Gordon Wendell Kahl, and if the jury had believed the evidence, the jury would have been justified in finding that he was not Gordon Wendell Kahl.

Gordon Wendell Kahl's daughter, Lorna Kahl, whom Fahamy Malak testified was extremely co-operative and interested in trying to ascertain the identity of the corpse (see transcript page 626-637) testified under oath that the teeth given to her which supposedly belong to her father were not her father's. In fact. she was given a full set of thirty-two (32) teeth which looked brand new and which she was certain did not belong to her father and which were represented by the medical examiner's office in Arkansas to have come from her father. She explained that her father's teeth were not in good condition and he had lost several of them serving the United States during World War II.

Either Lorna Kahl was committing perjury when she testified that her father did not have all of his teeth (see transcript page 1200 and 1201) and the neighbor who took the stand and testified

also that Mr. Kahl did not have all of his teeth (see transcript page 1206 and 1207) or someone assisting in the identification of the corpse for the Government felt he/she needed to tie down its proof absolutely and falsified evidence. The key identification issue, the teeth, was disputed. The Court ruled the neighbor could not testify that Kahl had told him he didn't have thirty-two (32) teeth. Important impeachment evidence was thus denied. (See transcript page 1206-1207). The absolute proof of Fahamy Malak was reached utilizing the dental report. The evidence was hearsay but it should have been admitted for purposed of impeachment. The Court carefully chose its words in sustaining the Government's objection; "I think any further inquiry into hearsay is purely hearsay and there's no exception to it." (See transcript page 1207). The dental report was not timely given to the defense counsel and was not analyzed prior to the trial. (See transcript page). Another possibility is that the Government created false evidence in order to prove that the deceased burnt corpse was Gordon Wendell Kahl, either:

A) Because they honestly believed that it was Kahl but felt their evidence was insufficient to support same; or,

B) Because they were afraid it wasn't Gordon Wendell Kahl.

Petitioner cannot represent to this Court that given a new trial, the jury given all of the evidence and all of the truth would not still find that the deceased was Gordon Wendell Kahl, but neither can the prosecutor, neither can the trial Judge and neither can the Supreme Court be certain that given the entire truth of the matter, the jury would not have suspected the motives of the Government and had a reasonable doubt on the identity issue of Gordon Wendell Kahl. Important impeachment testimony was kept out. Cross-examination was limited. Experts were prevented from testifying. The Defendants entire defense on the identity issue was ruled irrelevant. [(See transcript pages 1128, 1129, 556-559 (offer by Petitioner)].

Testimony of Fahamy Malak shows that the best evidence was the fingerprints and that they were not available. (See transcript page 652), the fingerprints were completely destroyed by the fire. The second best evidence according was the teeth. (See transcript page 630).

The Government presented Dero Downing as their witness for

the purpose of establishing part of what happened, on or about June 3, 1983, at the alleged "shoot-out" at the Ginter residence. He also testified about the fire. It was the position of the defense that cross-examination should have been permitted to prove that the Government agents were not certain that the man they killed inside the house was Gordon Wendell Kahl, and that they had in fact decided to burn him beyond recognition for the purposes of preventing the discovery that they had killed the wrong man. It was also the intention of the defense to show the bad faith actions on the part of the Government by intentionally torching the Ginter residence. Other Government officials, Blasingame, head of the F.B.I. for Arkansas, and officer Dero Downing had previously implied under oath that this was not the case.(See transcript page 457-554). An offer of proof was made and the following was put into the record:

The Court refused to allow Marshall Tom Lee to testify. Tom Lee's testimony would have been that he was instructed to intentionally cause the fire which burned the Ginter residence. (See transcript page 1128 offer by Karr objection joined by Russell and Petitioner). The Court precluded the defense from attempting to prove Arson on the part of the Government. The 8th Circuit opinion with regard to this was: "the District Court also noted that the destruction of the fingerprints by the fire potentially served to aid the Defendants because it made it more difficult for the Government to establish the identification of the corpse". (See Addendum opinion).

The Petitioner disputes the statement of the District Court. The District Court is finding as a matter of law that the corpse was Gordon Wendell Kahl and forbidding the Defendant (Petitioner) and his Co-Defendants from proving that the fire was intentionally accelerated, destroying evidence in bad faith. The trial Court took this out of the province of the jury and determined that bad faith was not an issue for the jury to consider. This is an unusual position which has never been reported in any of the Circuits of the United States. As a general rule, the destruction of evidence alone, unless bad faith is proven, will not support a judgement for acquittal. At the very least, the bad faith of the Government officials is reviewable by the jury to determine what amount of credibility they wish to give the Government witnesses.

In *Edwards vs. State of Oklahoma,* 429 F.Supp. 668, (1976) evidence was destroyed.

The Defendant was jailed for driving while intoxicated. The test ampoule held by law enforcement officials was destroyed. There was no showing that this was a malicious destruction but in fact, routine since it was not customary for these ampoules to be saved. The Defendant wished to have his conviction reversed because his motion to supress the breathalizer test results was denied and he was not allowed to make his own test of the ampoule. The issue was one of suppression of evidence. In the instant case, no evidence was produced to show the routine good faith burning of bodies by the F.B.I.

In *U.S. vs Baca,* 687 F.2d 1356, (10th Cir. 1982), destruction of important evidence by the State Officials prior to the issuance of the Federal Indictment did not per se preclude the Federal Government from prosecuting. Heroin was destroyed. The Federal Officials did not destroy it. The State officials said there was substantial proof that it had been heroin and the defense counsel had had ample time to test the heroin prior to the time it had been destroyed but he made no effort to do so. This showed no evidence of bad faith and in any event, there was no representation in the case that the jury was deprived of learning that the heroin had been destroyed, just as there was no representation in *Edwards,* (supra), that the jury was not allowed to know that the evidence had been destroyed.

In *U.S. vs. Heiden,* 508 F.2d 898, (9th Cir. 1974), marijuana was destroyed. The Government stated: "that because of contraband storage problems in the Southern District of California, the Chief Judge has ordered all but twenty four (24) kilo packages may be destroyed in large marijuana seizures." The Court indicated that:

"When there is loss or destruction of such evidence, we will reverse a Defendent's conviction if he can show (1) bad faith or connivance on the part of the Government; or (2) that he was prejudiced by the loss of the evidence." [Quoting *U.S. vs. Henry,* 487 F.2d 912, (9th Cir. 1973)]. "There was no evidence in the record of bad faith or connivance on the part of the Government." In the instant case, there was no evidence of bad faith allowed into the record. The trial Court ruled this inadmissible. In *U.S. vs.*

Henry, (supra), the Defendant failed to meet his burden of demonstrating an improper motive on the part of the Government. No reason to suppose he was prejudiced was shown. The Judgement was affirmed. The Government acted in good faith when it destroyed the evidence in question. The evidence in question was heroin. The evidence was admitted, the Appellate Court sustaining the trial Courts refusal to suppress the evidence.

In the 1st Circuit, in *U.S. vs. Arra*, (see 630 F.2d 836, 1980), the Court indicated that the destruction of evidence was not commendable but under the circumstances, it was not so prejudicial to the Defendant as to deprive the Defendant of due process. In this case also the Court ruled that the destruction of evidence itself is not per se grounds for reversal unless evidence of bad faith is determined.

In *U.S. vs. Picariello*, 568 F.2d 222, (1st Cir. 1978), dynamite was destroyed. Four (4) months had passed between the seizure of the evidence and the destruction of same and there was an opportunity for the Defendant to examine the evidence.

In *Government of the Virgin Island vs. Testamark*, 570 F.2 1162, (3rd Cir. 1978), the Court ruled that the failure to refrigerate blood sample, (rendering the sample unusuable), was harmless error, despite the claim that the Government destroyed evidence by which the Defendant could have conclusively established his defensive of incapacity. The blood sample could have been relevant to show whether the Defendant was sufficiently competent to rape. On this point, evidence presented at trial, including Defendant's own testimony weighted heavily against Defendant's contentions. The conviction was affirmed. Again, the dispute was not whether the Defendant could use his expert, but whether the Government could use its evidence.

There is no allegation in the petition that the circumstances surrounding the destruction of the evidence was kept out of trial. The Circuits seem to differ whether or not destruction of evidence, in and of itself, is grounds for reversal. Some indicate that if it is done in bad faith it might be. (Supra). Some state that it would certainly be grounds for acquittal or reversal if done in bad faith, (supra) and some state that is must be germane to the defense. The defense has the burden of proving prejudice. The First Circuit has the most stringent standard for reversal. The case itself is

reviewed and if there is substantial evidence which tend to support the verdict, the verdict will be sustained. (See *Arra* supra).

None of the Circuits, however, condone the destruction of evidence. The type of evidence that is destroyed, heroin, blood samples, items that are difficult to store, and marijuana were generally not supressed because the Defendant could not show bad faith destruction. There is no reported case of the incidence of the intentional destruction of a human body by Federal officers.

There is no case reported in any of the Federal Courts in which the Court ruled that the motive behind the destruction of evidence was not admissible before the jury, in fact, the cases indicate that the motive must be shown to be innocent in order to avoid the suppression of "proof" of the destroyed evidence. The rule in the reported cases appears to be: Since the jury felt the destruction of evidence was not sufficient to destroy government creditability, the Appellate Courts will support the jury decision. The issue has been whether or not the jury should have been allowed to "see" the evidence that was destroyed. The issue was always one of suppression of evidence that could not be examined by the Defendant. The issue has never been whether the Defendant had a right to cross-examine or impeach through its own witnesses the Government version of the destroyed evidence. The issue has never been whether the Government could suppress the Defendant's version.

In the instant case, the Honorable Judge Franklin Waters ruled that the destruction of evidence by the Government was not relevant. The evidence that was destroyed was the body which was identified as Gordon Wendell Kahl. The evidence which was ommitted from the jury would have proven if found credible:

A) A fire was deliberately set.
B) The fire that was deliberately set was accelerated.
C) The teeth used to identify Kahl did not belong to him.

The jury was not allowed to determine whether or not that impeached the creditability of the witnesses. The evidence which constituted the entire case of the Defendants on the identity issue was excluded. The Court in a curious decision allowed one hundred percent (100%) of the expert testimony offered by the Government and disallowed one hundred percent (100%) of the

expert testimony offered by the defense on the identification issue.

The Court thereby ruled as a matter of law that the corpse was Gordon Wendell Kahl. It is of course, the sin qua non of harboring that the Petitioner cannot be guilty of harboring a fugitive or conspiring to harbor a fugitive if the person that he harbored was not the fugitive.

In the much publicized heavily dissented case *U.S. vs. Loud Hawk*, 628 F.2d 1139, (9th Cir. 1979), the trial Court entered a judgement of acquittal and was later reversed. Dynamite, the key evidence, was destroyed. One substantial question discussed by the Appellate Court was whether the State authorities who destroyed the dynamite did so under federal control. The majority found they did not. In the instant case, the offer of proof showed the F.B.I. ordered accelerants poured into the premises. (See transcript page 1128 and 1129). Had the Federal Bureau of Investigation ordered the evidence destroyed, the majority of the Court implies an acquittal would have been justified (the dissenters urged acquittal in any event).

The Defendant was permitted to put on expert testimony that tended to show the evidence destroyed had not been dynamite and was thus exculpatory. The expert could not testify the destroyed substance was definitely not dynamite. The jury chose to disregard his testimony and found it was dynamite, convicting the Defendant.

In the instant case, the Government said the property was not intentionally set aflame or if it was they had no knowledge of it. The Defendants disputed this. (See transcript page 1128, Tom Lee offer by Karr, page 1128, 1129. Experts offered by Izen).

The expert testimony of the Defendants would have been conclusive, showing Arson. The jury of course could elect to go with the Government witness or go with the Defendant's witness and still not find bad faith but that election was taken out of their hands as a matter of law by the trial Court.

QUESTION III.

Jury Prejudice

There was during the trial a substantial amount of conduct which

prejudiced the Petitioner's opportunity for a fair trial and prevented the due process rights guaranteed the Petitioner under the Fourteenth Amendment. The jury, under the circumstances, was not able to render an impartial verdict.

Petitioner asks this Court to examine five (5) of those events which taken together prevented the jury from deliberating in a fair and impartial manner. Some are even stipulated to be prejudicial.

1. Government's Exhibit "8".

2. Improper communication with jury member, a winking incident.

3. Hearsay identification which the jury could not be expected to disregard and improper Court instructions.

4. Photo incident.

5. Publicity and extraordinary security precautions.

1. Government's Exhibit "8". On page 303, line 20, by McCord, in reference to Government's Exhibit "8", the following took place,

"Q: I believe I had asked you to describe Government's Exhibit #8, Ms. Robertson."

Line 22. "A: Yes, sir. It is a drawing that Gordon Kahl made."

Line 23. "Q: Did he make the drawing in your presence?"

Line 24. "A: Yes, sir."

Line 25. "Q: Did he discuss the drawing with you?"

Line 1. Page 304. "A: Yes, sir."

Line 2. "Q: Would you describe actually what the drawing depicts or purports to represent?"

Objection by Minns continued Line 12, Page 304.

"Your Honor, first of all, I never met Gordon Kahl. I don't represent Gordon Kahl, but these things are terribly prejudicial. They seem to mock every religion and race on the face of the earth."

Line 22 by the Court. "Well, I know, but what relevancy, Mr. McCord, does it have to get her description of what was meant by all of this?"

Line 25 by McCord, "I was just asking in general terms."

Page 305, line 1. "I did not intend, nor do I intend at this

time to go into all of this prejudicial stuff, which I agree would be highly prejudicial."

Page 305, Line 4 by the Court. "Don't do it. Now, if you want to -- And I don't know what purpose it served even to have her say it's Arthur Russell's letterhead, because it obviously is and it's going to be in evidence at some point."

Line 8 by McCord. "Yes, sir."

Line 9 by Minns. "Your Honor, I am prepared to stipulate that Mr. Kahl's -- or the signature that says Mr. Kahl's is on that document and that there's a letterhead with Arthur H. Russell's name on it and they can show linkage without putting that exhibit into evidence."

Line 14 by Court. "Well, it may be prejudicial to somebody else. I don't understand it, and I would be very surprised if the jury does. I'm not going to sustain that objection."

Page 306, Line 11 by Court. "Well, as I've indicated, if there's anybody on the jury that understands that without talking to Gordon Kahl, they have far greater powers than I or anybody else in this courtroom."

Line 15 by Minns. "Your Honor, the seven heads of the beast, that's from Revelations. It's satan."

Line 17 by Court. "I'm not that much of a student of the Bible, I guess, but I'm going to overrule the objections in that regard."

The document which was prejudicial per se (the Government and the Defendant concurred that it was prejudicial) was admitted into evidence over the objection of the Petitioner's counsel. This incident is possibly unique. The defense was willing to stipulate just about anything the Government wanted or intended to prove by the use of the "highly prejudicial" document. Whether or not the document was "highly prejudicial" or not, generally would be an issue for consideration by the Appellate Court, but in this specific instance, the prejudice was stipulated.

2. Improper communication with jury member, a winking incident:

A) On page 136, line 22 by Minns:

"Your Honor, I need to do this as delicately as possible because I don't want the woman to think I'm singling her out or anything but the elderly gray-haired woman the third from the end

there, she's seated as juror number twenty-five, winked at the marshal when she got up."

Page 137, Line 3 by Court. "Mr. Minns, you see more than anybody I've ever seen. I don't doubt that you believe you saw that but the Court is not going to strike juror number whichever it is."

Line 7 by Minns: "I would like the Court to ask if she knows the man."

Line 9 by Court: "Well, I'm just not going to do it at this point."

Improper communications with the jury is not acceptable(see *Tillman vs. U.S.*, 395 U.S. 830, Supreme Court). The burden is one of the party alleging the misconduct to prove it, but if the Court refuses to make an inquiry, how can the burden be met? Petitioner does not know what additional effort at proof could have been made. Unauthorized private contact is not acceptable. See *U.S. vs. Brasco*, 516 F.2d 816 (2nd Cir. New York).

B) Page 143, line 2 by Minns.

"Your Honor, number twenty-five on the original list was not talked to, at my request, by this Court, and so we had to use up, over the objections of the other attorneys. I used up the strike therefore we would have had one additional strike, and that strike --my preference would have been juror number three."

Line 8 by Court. "Is that the lady, the one you wanted striken and you had to use you strike -- if that the lady that you believe winked at the marshal?"

Line 11 by Minns. "Yes, your Honor. But because I was forced, because of that, to -- There are some other people that saw that also, your Honor, and because I was forced to do that, I had to leave on another juror that I did not feel comfortable with."

Line 16 by Court. "I understand. Your record is made. The court does not believe there is even -- even if it occurred, that there is any significance in a wink. Some people use that as a means of saying hello or goodbye or, 'I don't like your,' and a lot of other things. So the court doesn't believe there's any significance in a wink, even if it did take place. Any other matters?"

Line 24 by Karr. "Excuse me. I did not see that but my clients pointed that out to me before we even went back to dicuss that. They pointed out that juror, that they had seen the same thing."

The Court denied the request to question the juror and the Court denied the striking of the juror. The following two jurors were left on the jury panel:

Page 85, line 5 by Isaacs. "Gary Isaacs. I used to be in the Army Military Police. My grandfather used to work for the Sheriff's department in El Paso, Texas."

Gary Isaacs ended up on the jury. Petitioner would have preferred to have taken him off, because of his law enforcement background.

Page 87, line 22 by Downs. "Marion Downs. I'm employed by the Arkansas State Highway Transportation Department."

Petitioner would have preferred to stike Mr. Downs because of his relationship to the Government.

Although irrelevant and inaccurate, the Government was allowed to try the murder case of Arkansas Sheriff Gene Matthews. (As was later determined, he was not killed by the man alleged to be Kahl and State murder charges were dropped against Norma Ginter and Leonard Ginter two Co-defendants herein. See entire record).

3. Hearsay identification which the jury could not be expected to disregard and improper Court instructions.

A) Page 95, line 3 by Court:

"Now, will the fact that these individuals, according to the news media, may have been people who protested the payment of federal taxes, would that cause you a problem either way?"

Line 23 by Court. "I understand that. And, again, living in this part of the country, anyone who is alive will have read or heard allegations that these individuals are tax protesters.

Page 96, line 8 request for a jury panel by Minns. "Your Honor, what I had read about that in regard to my clients, the Udey's explained their position and explained the fact that they felt they had not wrongfully -- that they owed tax money due the government and, in fact, were not protesters. And now they've been labeled protesters."

The Court should not have instructed the jury that Edwin C. Udey had been labeled a tax protester. The Court's voir dire branded the Petitioner unfavorably and untruthfully.

B) The Court allowed prejudicial information in the form of double hearsay to indicate that Gordon Kahl would not be taken alive. This allowed an already inflamed jury to become more anxious and was not relevant to this case according to the previous rulings of the Court.

Page 222, line 15 by Karr. "A: The nearest -- When the original summons was served on Mr. Kahl, he states, 'I'll take the summons this time, but, when you come back the next time, you'd better bring more help'."

Page 223, line 4 in response to Karr's question. "A: Again, before the first meeting with Mr. Kahl, Mr. Kahl gave an interview to the Harvey Herald newspaper and, at that time , he stated in there, with his picture that's on record, his picture and everything, his interview stated, 'If they come after me, somebody is going to get hurt'."

Objection was made that it was prejudicial and irrevelant and objection was further made that it was a comment on hearsay evidence, request for mistrial was made, objections were overruled and denied. (Page 463, page 467, line 8, an objection by Minns was made to the use of the word Possee also.)

The Government was now using hearsay to try Gordon Wendell Kahl without any exception to the hearsay rule or relevancy. Although the Defendant was not allowed to show through hearsay, the relevant tooth impeachment evidence (supra). It was agreed by all counsel that the word Possee or Possee Comitatus or CSA or any of other allegedly militant organizations were inflammatory and irrelevant. The Court and the government argued that it was in response to a question and there was no choice but to answer it in that way. (Page 468, line 15 by Hutchinson). The Possee was allegedly a dangerous para-military group. Unfortunately for the Petitioner, this was not relevant, he was not a member or a sympathizer with the group, but over the Court's Orders, a carefully coached highly paid Informant let the jury think he was.

When the corpse was dead, Norma gave identification evidence. This hearsay could not be part of the furtherance of a conspiracy since after the death of "Kahl", the conspiracy could no longer be continuing. The jury was instructed to disregard this evidence identifying Kahl. They might as well have been asked to

disregard the photo incident, (infra). Even if Kahl was not dead, it could not be construed under *U.S. vs. Bell* (supra), as furthering the conspiracy, because the act of identifying the person that they were allegedly harboring as Gordon Kahl in and of itself, is an act in violation of the intent to harbor, or conspiracy to harbor.

4. Photo Incident. The Court interviewed two of the jurors incamera without attorneys present to determine their feelings. (The entire incident is recorded in the transcript on pages 1252 through 1266, excerpts are reprinted in this Brief). A woman (a disturbed relative of the Defendant Russell) photographed several of the jury members and caused an incident. (Herein called the photo incident). The Court discussed the photo incident with two (2) jurors and the record will reflect the following:

Page 1252, line 9 by Ms. Keele. "You know, when we came out, you know, there hadn't normally been anyone there, you know, in front of us except the T.V. people right out front. And, you know, when we came out together, you know, some of the women were walking together and, you know, we kind of looked at each other and we noticed the lady, you know, off to the side, and we noticed that, your know, she wasn't -- you know, the majority of the people that were out there were men, as far as the ones with the cameras. And, you know, we just kept looking, and she just kept turning, you know, as we kept walking on, you know, she just kept turning with the camera as if she was taking, for instance, the parking lot or the people or whatever. But when we came out and we looked at her, you know, her camera was pointed toward us. And then as we walked on to our cars, you know, another --I believe it was Donna, I believe is her name -- you know, she said something, 'Is she making pictures?', you know, or something like that."

Page 1253, line 5. "And I had the intention of, you know, reporting this to the policeman as I went out, but she went out in front of me, and she reported it."

Line 14 by Ms. Keele. "Well, the only thing I know is, the next morning when we came in, a policeman, you know, took my driver's license, he said, for identification."

Line 23 by Court. "It was really another juror that complained to him about it, though; is that right?"

Line 25 by Ms. Keele. "That told the officer, uh-huh."

Page 1254, line 1, by Court. "What is her name? ..."

Line 2 by Ms. Keele. "I just know her by Donna, you know."

Line 3 by Court. "Okay. How many of you all were together when this occurred?"

Line 5 by Ms. Keele. "Well, beside me was a couple more women. The only one I was aware that was right beside me was Janis Wootan."

Line 8 by Court. "Okay. Do you know, or do the other jurors know who the lady was by name, or is she related to somebody involved in the trial, or do you know?"

Line 11 by Ms. Keele. "No, I don't know."

Line 12 by Court. "You don't know whether she's related or not?"

Line 14 by Ms. Keele. "I don't know who she was."

Line 15 by Court. "Okay. Do the other jurors -- by that, I mean most of the other jurors, if not all of them -- know about the incident?"

Line 18 by Ms. Keele. **"I think they're aware of it, because I think just about all of them noticed, you know, that she was."**

Page 1254, line 22 by Court. "... does the incident bother you in that it would bother you sitting on the trial?"

Line 24 by Ms. Keele. "No."

Line 25 by Court. "I realize you can't speak for the others, but what is your impression about the effect that this had on other jurors, if any?"

Page 1255, line 3 by Ms. Keele. "I don't think it's had an effect, you know, that they were -- no one seemed to be upset, you know, to the point that they were excited or anything, you know. They just made mention, you know, that -- they just may know that they had their picture took."

Line 22 by Ms. Keele. "You know, when we came out, I would say that just about all of them were aware of it, you know. We just didn't know what she was doing or anything. And, you know, me personally, you know, I just didn't want my picture taken, as far as that goes."

Line 2 by Court, Page 1256. "Sure. Okay. And at least you do not know who the lady was, whether she was related in some way to somebody else of anything of that nature?"

Line 5 by Ms. Keele. "I can't ever say that I've seen her in the courtroom, because most of the time I don't look back that way."

Line 8 by Court. "I agree, I don't either."

Line 9 by Ms. Keele. "I just feel it's best to look at who's speaking."

Line 11 by Court. "Sure. Listen, we appreciate it very much and appreciate you candor. We don't do anything else about it unless -- I'm going to talk to the lawyers, and we may or may not call the entire jury in to talk about it, but don't say anything about it, if you would, until we make a decision on that."

Line 17 by Ms. Keele. "Okay."

The Court did not inform defense counsel about Janis Wootan but did discuss Keele and Coleman.

Page 1264, line 8 by Court. "All right. I'm going to bring Ms. Coleman in over the objection of Mr. Minns, but we'll bring Ms. Coleman in out of the presence of the jury, out of the presence of the other jurors and out of the presence of the lawyers, and I'll talk with her."

Line 19 by Karr. "Excuse me, you Honor. I'm on Mr. Minns' side in this. I believe any further discussion of the matter is just going to emphasize a problem that may already be -- I don't know that it could be cured by anthing, but any further inquiry into it, I think, is just going to make matters worse."

Line 25 by Court. "I think that's a possibility, but I think, in view of the request by Mr. Izen, the court really has no choice. I think I have to find out if Ms. Coleman harbors some kind of resentment because of it, and I think that his request is justified in view of all the circumstances."

Page 1265 by Court. "Why don't you tell me what you know about it, what you remember about it, and then I want to ask you what effect, if any, that has on you in the case."

The photo incident was apparently so ingrained in this juror's mind that Ms. Coleman knew about the photo incident and apparently knew the Court was referring to this incident without specifically having it identified.

Line 23 by Ms. Coleman. "Well, we came out the door. She and I were, you know, right there together, and she said, 'I think they're taking our picture'."

Page 1266, line 9 by Ms. Coleman. "... I thought about it, and so I just stopped and asked the security guard if they had the right to do that. And I told him that I had rather that they didn't take my picture. And he said no, that they did not, and he asked me who took it. And I said, 'Those two women over there,' and they were the only two women other than the jury, that was outside at the time. And he said no, that they did not have the right, and he would go see about it, and I left. And then Sandra told me the next morning that, as she came in the next day, I think they asked her about it, and that he did take the film away from them."

Line 20 by Court. "Do you know who the lady was? Has she been a spectator in the audience?"

Line 22 by Ms. Coleman. "(Nods affirmatively.)"

Line 23 by Court. "Do you know who she is?"

Line 24 by Ms. Coleman. "I have just -- you know, I really don't know. I have connected that she is a relative of Mr. Russell. I think it's a daughter-in-law. But you know, I really don't know."

Page 1267, line 3 by Court. "What effect, if any, Ms. Coleman, does that have on you? Do you feel that it would in any way affect you and your impartiality in the case?"

Line 6 by Ms. Coleman. "No. **I didn't like the incident**, but as far as what she done, I can't connect it with any of the people that are on the trial."

Line 9 by Court. "I wouldn't affect your result at all?"

Line 10 by Ms. Coleman. **"You know, if she was connected with it some way it might, but, you know, due to the fact that it really isn't --"**

Page 1268, line 12, an answer to the Court's inquiry, can you be fair? by Ms. Coleman. "Like I say, had it been one of the people that are on trial out there taking the picture, you know, it would have. But, due to the fact that it wasn't, you know, it wouldn't."

The Court wisely eliminated Ms. Coleman from the jury panel finding the witness might be prejudiced but Janis Wootan was never interviewed and her name was not shared with Defendant's counsel.

One person from that jury was pulled out because of the photo incident and asked not to discuss the incident with anybody until

after the Court had ruled who would remain on the jury. That person also, gave the Court the name of the other person who was immediately thereafter interviewed by the Court, and striken by the Court from the jury. It is unlikely that that juror did not put two and two together and realize that the Court found that the incident had caused the second juror to be prejudiced. The retained juror was under no orders by the Court not to discuss this incident with other jurors after the Court decided who would remain. The testimony of the jurors indicated that numerous (if not all) other jurors saw the incident. The Motion for Mistrial should have been granted.

5. Publicity and Extraordinary Security Precautions. This portion of the issue is going to be covered by Karr and Izen and Petitioner herein adopts those portions of their Briefs dealing with this. The record is clear that a substantial amount of publicity existed and the security precautions were unprecedented.

REASONS FOR ALLOWANCE OF THE WRIT

The Statement of Issues presented for review, supra, set forth important constitutional questions and questions of law in which the 8th Circuit has forged new boundaries in an unprecedented attack on constitutionally protected human rights to peaceably assemble, cross-examination at trial, and due process.

The Court has ruled that a man may be found guilty of a federal crime and sentenced to five (5) years in jail on the basis of association.

The Court has granted the Government license to commit the bad faith destruction of evidence and allowed the trial Court to prevent impeachment evidence or bad faith evidence under the theory that it is irrelevant.

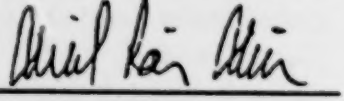
The Court has allowed substantial jury tampering to take place with impunity, under circumstances which precluded an impartial jury.

CONCLUSION

For all of these reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL LOUIS MINNS, P.L.C.

BY: 

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CERTIFICATE OF SERVICE

I, Michael Louis Minns, do hereby certify that a true and correct copy of this Brief has been forwarded to the following parties on this the 12th day of February, 1984:

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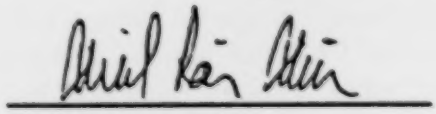

Michael Louis Minns

(Appendices follow)

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 83-2615

United States of America,
Appellee,

v.

Ed Udey,
Apppellant.

No. 83-2632

United States of America,
Appellee,

v.

Arthur H. Russell,
Appellant.

Appeals from the United States
District Court for the Western
District of Arkansas

No. 83-2654

United States of America,
Appellee,

v.

Leonard G. Ginter,
Appelant.

No. 83-2655

United States of America,
Appellee,

v.

Norma Ginter,
Appellant.

Submitted: May 14, 1984

Filed: November 7, 1984

Before: LAY, Chief Judge, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

The appellants, Edwin C. Udey, Arthur H. Russell, Leonard Ginter, and Norma Ginter, were indicted for conspiring to harbor and conceal a fugitive, and for the substantive offense of harboring and concealing a fugitive. They were tried by a jury and convicted on each count. The district court[1] sentenced Udey to five years imprisonment on each count with the sentences to run concurrently. Russell was sentenced to five years on each count, but the period of actual incarceration was to be six months followed by four years probation in lieu of the remainder of the term which was suspended. Leonard Ginter received a sentence of five years on each count with the sentences to run concurrently. Norma Ginter was sentenced to five years on each count, but the sentence was suspended and a five year probation term was imposed instead. The defendants appeal their convictions under 28 U.S.C. § 1291 (West Supp. 1984). For the reasons stated herein we affirm the convictions.

[1]The Honorable H. Franklin Waters, Chief Judge, United States District Court, Western District of Missouri.

I. FACTS

On February 13, 1983, a shootout occurred in Medina, North Dakota, which resulted in the death of two United States Marshals.[2] The following day a magistrate issued a warrant for the arrest of Gordon W. Kahl for the murders of the two marshals. Thereafter, on March 11, 1983, another warrant for Kahl's arrest was issued based upon a federal grand jury's indictment charging Kahl with murder. A nationwide manhunt for Kahl ensued, leading law enforcement authorities to the Ginters' residence near Smithville, Arkansas, where another shootout occurred in which Gordon Kahl and a local law enforcement officer were killed.

The evidence at trial--elicited largely from Karen Robertson, Arthur Russell's daughter--established that on March 13, 1983, Leonard Ginter was introduced to Karen Robertson at Russell's home in Mountain Home, Arkansas. The same day Gordon Kahl moved into the Russell residence where he continued to reside until May 30, 1983. During this period Kahl discussed the North Dakota incident with Russell and Robertson, and they watched television news accounts of the search for Kahl.

Udey visited the Russell residence during this period, and on his first visit he referred to Kahl as a hero. Thereafter Kahl visited Udey's residence at least twice. Udey initiated at least one of the visits by inviting Kahl to dinner.

In mid-May 1983, the Ginters visited Russell's residence. Leonard Ginter had an FBI wanted poster of Kahl, which was discussed with Kahl. On May 30, 1983, another discussion with Kahl took place at the Russell residence, where the Ginters, Russell, and Udey were present, regarding the FBI search. Later that day Gordon Kahl moved to the Ginters' residence near Smithville, Arkansas, as the group believed the FBI to be "closing in" on Kahl.

On June 3, 1983, law enforcement authorities went to the Ginter residence in search of Kahl, and a shootout occurred. The Ginters' home was burned down during the shootout. Afterwards,

---

[2]The details of the Medina shootout, and the events leading to the search for Gordon Kahl are discussed at length in *United States v. Faul*, No. 83-1912 (8th Cir. , 1984).

the remains of a mini-14 rifle similar to one that Kahl had at the Russell residence was recovered. Also recovered in a similar condition, was a shotgun belonging to the United States Marshals' office in North Dakota, which was lost in the February 13, Medina shootout. The body of a man burned beyond recognition was also discovered; it was later identified by the Medical Examiner as Gordon Kahl.

II. ISSUES

The appellants raise several issues on appeal. They are: 1) whether the district court erred in denying Udey's and Russell's motions for acquittal; 2) whether the convictions constitute double jeopardy; 3) whether the district court erred in denying the motions to suppress evidence; 4) whether the district court erred in denying admission of the defendants' expert's testimony; 5) whether the district court erred in not appointing the Ginters the counsel of their choice; 6) whether the district court erred in refusing to admit statements made by the Ginters to the police; and 7) whether Udey's sentence was too harsh.

III. DISCUSSION

A. Motions for Acquittal

Russell and Udey allege that the trial court erred in denying their motions for acquittal. Udey claims the evidence failed to show that he had knowledge of the warrant for Kahl's arrest. Russell claims that the evidence failed to establish an act by him of concealing Kahl.

In *United States v. Jackson*, 680 F.2d 561 (8th Cir. 1982), we stated:

> When reviewing a denial of a motion for acquittal we examine the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences that may logically be drawn from the evidence. We will reverse only if a reasonable jury could not have found beyond a reasonable doubt that the elements of the crime existed.

Id. at 563 (citations omitted). *See United States v. Michaels*, 726 F.2d 1307, 1311 (8th Cir. 1984).

In order to prove the violations of 18 U.S.C. § 1071 charged in

Count II and III of the indictment, the government had to establish that: (1) the defendants knew that federal warrant had been issued for Kahl's arrest; (2) the defendants harbored or concealed Kahl; and (3) the defendants intended to prevent Kahl's discovery and arrest. *See United States v. Hash*, 688 F.2d 49, 52 (8th Cir. 1982); *United States v. Bissonette*, 586 F.2d 73, 77 (8th Cir. 1978). Knowledge of the existence of the warrant is an equally essential element of conspiring to harbor or conceal in violation of 18 U.S.C. § 371, as charged in Count I of the indictment. *See United States v. Hogg*, 670 F.2d 1358, 1361 (4th Cir. 1982). Direct proof of knowledge of the existence of a warrant is rarely available. Rather, the knowledge element can be established by evidence from which the jury can properly infer knowledge and guilt beyond a reasonable doubt. *See Bissonette, supra*, 586 F.2d at 77. Additionally, in order to prove a violation of 18 U.S.C. § 371, the government had to prove: (1) the defendants entered into an agreement; (2) the agreement had as its objective a violation of the law, and (3) that one of those in agreement committed an act in furtherance of the objective. *Michaels, supra*, 726 F.2d at 1310-11. Once the existence of the conspiracy is established, "even slight evidence connecting a particular defendant to the conspiracy may be substantial and therfore sufficient proof of the defendant's involvement in the scheme." *Id.* at 1311 (citations omitted).

Russell claims that the evidence was insufficient to support his conviction because it did not establish that he concealed Gordon Kahl. In this case the evidence overwhelmingly established that Russell knew a federal warrant had been issued for Kahl's arrest. The testimony showed that he had discussed the FBI wanted posters with Kahl and others. With the knowledge of the outstanding warrants, Russell allowed Kahl to stay in his home thereby concealing Kahl from the law enforcement agencies that sought his arrest. He instructed his daughter, who eventually turned Kahl in, to remain silent about the fugitive's presence and identity. On these facts we believe the jury could reasonably have inferred Russell's intention to prevent Kahl's discovery. Accordingly, his motion for acquittal was correctly denied.

Udey claims that the evidence failed to establish that he had knowledge of the existence of the warrant for Kahl's arrest.

The appellant concedes that the evidence established that he met Gordon Kahl at Russell's home, referred to him by his alias name "Curly," and called him a hero. The evidence also established that Kahl visited Udey's home on at least two occasions. Nonetheless, Udey argues that the evidence failed to show that he knew Kahl's true identity, or that a warrant was outstanding for his arrest. The appellant alleges that the evidence was so scant that it allowed the jury merely to speculate, and that the jury must have had a reasonable doubt as to his guilt. *See United States v. Frol*, 518 F.2d 1134, 1137, (8th Cir. 1975).

While the evidence with regard to Udey's guilt was not overwhelming, neither was it merely speculative. At a minimum it was sufficient to allow the issue to be presented to the jury which could properly have inferred "knowledge and guilt beyond a reasonable doubt." *Bissonette, supra*, 586 F.2d at 77. In addition to the circumstantial evidence discussed above, Karen Robertson testified that Mr. Udey was present during a May 30th discussion pertaining to the FBI closing in on Kahl; she specifically recalled seeing Udey's car.

> Q. Let's move on into May 30th, Memorial Day of this year, which you testified was the day Gordon Kahl left the residence. Do you recall that day?
>
> A. Yes, Sir.
>
> Q. Would you describe to the jury the facts and circumstances of his departure, his leaving your house?
>
> A. I had some stuff in the back of my pickup that I needed to unload and Mr. Ginter and Ed Udey were at the house and I went to get gas and unload the pickup. And when I was leaving, they all went into the motor home to talk.
>
> Q. Now, when you say, "they all went in the motor home to talk," name the people you're talking about, please.
>
> A. Mr. Kahl and Mr. Ginter and, I believe, Mr. Udey also.
>
> Q. Okay. Were there any vehicles there at your residence that did not belong either to you or your father?
>
> A. Yes, sir.

Q. And would you describe as best you can any such vehicle.

A. Mr. Udey's car and another small subcompact car.

Q. Do you recall what color this other compact or subcompact car was?

A. It was kind of a yellow cream color.

Q. Now, you say that these people had a conversation there at your father's house on this occasion. Did you overhear any of that conversation?

A. Just that they thought the F.B.I. was closing in. That's--

Q. Now, you say you left to go on an errand; is that correct?

A. To get gas and then come back and unload my truck.

Q. Okay. When you got back, was Ed Udey's car still there and this other cream-colored compact?

A. When I backed my truck into the pasture, they were still there.

Transcript at 322-23. Although during cross-examination she did not place Udey at the scene of this discussion, her testimony raised a question of fact to be resolved by the jury. *See United States v. Vitale,* 728 F.2d 1090, 1094 (8th Cir. 1984). The jury may well have believed the testimony Robertson gave during direct examination that Udey was present at this discussion, and on that basis could reasonably have inferred guilt. Additionally, when viewing the evidence in the light most favorable to the government, including all reasonable inferences which may be drawn, we believe that "a reasonable jury could * * * have found beyond a reasonable doubt that the elements of the crime existed." *Jackson, supra,* 680 F.2d at 563. In this case, the defendant's guilt is not being inferred solely on the basis of his presence or association with members of the conspiracy. *See United States v. Ward,* 703 F.2d 1058, 1062 (8th Cir. 1983). Rather, the jury could reasonably have found him guilty based upon his involvement in the May 30th plan to move Kahl from the Russell residence to the Ginter residence in an attempt to avoid the FBI. This conclusion is buttressed by testimony elicited from Karen Robertson on direct

examination which clearly established Udey's presence at the meeting in which the FBI's "closing in" was discussed. While Robertson's "I believe Mr. Udey" response may seem equivocal in terms of her placing him at the scene of this discussion, that response must be read in the context of the entire colloquy. Her responses to be the preceding and subsequent questions, unequivocally place Udey at Russel's home before, during, and after the FBI "closing in" comment. On this basis we hold that the district court correctly denied Udey's motion for acquittal.

B. Double Jeopardy

Russell and Udey contend that their sentences under Counts I and II of the indictment constitute double punishment prohibited by the fifth amendment's double jeopardy clause. Count I of the indictment charged the appellants with conspiring to harbor and conceal Kahl; Count II charged the substantive violation of 18 U.S.C. § 1071.

It is axiomatic that the double jeopardy clause protects against multiple punishments for greater and lesser included offenses. *See United States v. Kirk*, 723 F.2d 1379, 1381 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 1717 (1984). It is equally well established that a defendant does not receive double punishment when he is convicted and sentenced for a substantive offense, and for conspiring to commit the offense. *See United States v. Austin*, 529 F.2d 559, 562 (6th Cir. 1976). The appellants assert that *Austin* carves out an exception to these rules where proof of one count established the essential elements of the other. This is a fair interpretation of *Austin*.

In *Austin* the court held:

> [I]t is clear that the Fifth Amendment comes into play to prohibit double punishments where the substantive and conspiracy counts of an indictment charge essentially the same offense. * * * * The test to be applied to determine whether the offenses are separate or essentially congruent is the "same evidence" test. As the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act.

529 F.2d at 562(citations omitted). Appellants contend that *Austin* was followed by the First Circuit in *United States v. DeVincent*, 632 F.2d 155, 159 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981), and the Second Circuit in *United States v. Sperling*, 560 F.2d 1050, 1055 (2nd Cir. 1977). Appellants incorrectly constru these cases, *DeVincint* merely distinguished *Austin* in a footnote, and *Sperling* involved a conspiracy count and continuing criminal enterprise count, which, as this court has held, are greater and lesser included offenses. *See Kirk, supra*, 723 F.2d at 1381.[3] The Sixth Circuit has itself limited *Austin* to those instances where the substantive offense charges the same agreement or concert of action as the conspiracy count. *See United States v. Fife*, 573 F.2d 369, 372-73 (6th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *see also United States v. Bankston*, 603 F.2d 528, 534 n.7 (5th Cir. 1979) (limiting *Austin* in the same manner). This is not the factual circumstance presented in this case.

We believe that the distinction the First Circuit employed in *DeVincent*, is applicable here. That court stated:

There is an exception where the substantive and conspiracy counts happen to charge essentially

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[3]In *Kirk* this court specifically declined to decide whether multiple sentencing on conspiracy and criminal enterprise chares violates the double jeopardy clause. Similarly, our resolution of the issue presented by this appeal obviates the need to resolve that issue at this time.

established that Karen Robertson had not told law enforcement officers that she had seen Kahl in the Ginter's cream colored 1980 Dodge Omni, rather she had described the vehicle as a cream colored subcompact car similar to the one driven by Udey but lighter.

In *United States v. Doty*, 714 F.2d 761 (8th Cir. 1983), this court established the analysis to be employed when evaluating hearsay challenges to affidavits supporting warrants. This court opined:

> The standards for evaluating the validity of a search warrant based on hearsay were recently modified by the Supreme Court. In *Illinois v. Gates*, U.S. , 103 S.Ct 2317, 76 L.Ed.2d 527 (1983), a majority of the Court abandoned the "two-pronged" [*Aguilar-Spinelli* test], and substituted in its place a "totality of the circumstances" approach. *Gates*, 103 S.Ct at 2332. Under this standard,
>
> > [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed.
>
> *Id. (quoting Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4L.Ed.2d 697 (1960)).

In this context, we also observe that courts "evince a strong preference for searched made pursuant to warrant , and in some instances, may sustain them where warrantless searches based on a police officer's evaluation of probable cause might fail." *United States v. Carlson*, 697 F.2d 231, 237 (8th Cir. 1983). "[R]eviewing courts should interpret affidavits in a common-sense and realistic fashion, and deference is to be accorded an issuing magistrate's determination of probable cause." *Id.* Moreover, we are cognizant of the value to be given the corroboration in details of an informant's tip by independent police efforts. *Gates*, 103 S.Ct. at 2334; *Draper v. United States*, 358 U.S. 307, 313,79 S.Ct. 329, 333, 3L.Ed.2d 327

(1959).

Id. at 763. Under the "totality of the circumstances" approach established in *Gates*, and adopted by this court in *Doty*, the affidavits provide a sufficient foundation upon which the magistrate could have found proable cause to issue the warrant.

Here there was a tip given by an informant to an experienced FBI agent, to the effect that Kahl was with a given group of people in a particular type of car. The tip was subsequently corroborated by an aerial surveillance of the defendants' home where the car was in fact seen. We are satisfied that the affidavit provided a sufficient basis for the issuing magistrate's "common-sense" finding of proable cause. *Doty, supra*, 714 F.2d at 763.

Our conclusion is not altered by the alleged misstatement in the affidavit that Karen Roberton described a "cream colored 1980 Dodge Omni." Special Agent Knox testified that although the affidavit attributed this specific description of the vehicle to the informant, he had in fact arrived at this description based on the information she had given him. Even if the affidavit had merely described the vehicle as a "cream colored subcompact" similar to a Dodge Omni, the subsequent corroborating aerial surveillance would have been sufficient to establish probable cause. The fact that there also may have exisied probable cause to believe that Kahl was in the Udey vehicle--a cream colored subcompact--does not vitiate or militate against the probable cause determination regarding the Ginters.

Assuming arguendo that the warrant was invalid, the evidence discovered during the initial entry into the Ginters' home was nonetheless lawfully seized, and, therefore, admissible. The testimony shows that when Special Agent Blasingame was asked for a search warrant by Leonard Ginter, the shooting began inside the Ginter residence. From that moment forward, the house became the scene of a crime committed in the officers' presence. *See United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir. 1982), *aff'd in relevant part*, 710 F.2d 431, 432 (8th Cir. 1983) (en banc). Any weapons which were in plain view at the scene of the crime were thereby legitimately seized. Common-sense dictates that the potential danger at the scene of the crime and the attendant exigencies, including the need to aid anyone in the home, validated

the initial intrusiton into the Ginters' home.

Gordon Kahl's body was discovered during the initial entry into the home by law enforcement authorities. His mini-14 rifle was also discovered pursuant to the initial search. These items were clearly admissible.

The Remington pump shotgun belonging to the United States Marshals' office in North Dakota was discovered the day after the shootout pursuant to a search under the warrant. Even if the warrant was improvidently issued, the admission of the shotgun was harmless error beyond a reasonable doubt. See FED. R. CRIM. P. 52(a). The plain view discovery of the corpse, subsequently identified as Gordon Kahl, and the mini-14 rifle, clearly provided sufficient evidence upon which to convict the defendants. The shotgun cannot be said to be crucial evidence. Accordingly we hold that the motion to suppress was properly denied.

b) Ginters' Incriminating Statements

The Ginters argue that their initial responses to law enforcement officers' questions regarding the presence of others in their home should have been suppressed as they were not informed of their *Miranda* rights. Without examining the merits of this claim, the appellants concede that their motion to suppress did not address these statements. Furthermore, no objection was made to Agent Blasingame's testimony regarding those statements. Accordingly, the issue was not properly preserved for appeal because no objection was made at trial to the admission of the testimony. FED. R. EVID. 103; *see United States v. Vitals*, 728 F.2d 1090, 1092 (8th Cir. 1984); *United States v. Wagoner*, 713 F.2d 1371, 1376 (8th Cir. 1983). "Furthermore, we cannot say that appellant's claim amounts to plain error under FED. R. CRIM. P. 52(b)." *Vitale, supra*, 728 F.2d at 1092.[4]

---

[4]We note that the Supreme Court recently upheld the "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. *New York v. Quarles*, 104 S.Ct. 2626 (1984). We believe that the rationale employed in *Quarles* is applicable to the circumstances presented here and provides an alternative ground upon which to uphold the denial of the Ginters' motion to suppress.

Norma Ginter additionaly challenges the admissibility of inculpatory statements she made to law enforcement officers following her arrest. On the night of June 3, 1983, when Mrs. Ginter was being transported from her home to the police station upon being advised of her *Miranda* rights she invoked her right to silence. Later that night, or early the following morning, after being advised of her *Miranda* rights again and executing a document to that effect, she offered a statement to the authorities. At the suppression hearing she testified that this statement was not coerced. On June 7, 1983, Special Agent Calhoun again sought to speak with Mrs. Ginter but she indicated that she did not want to be interviewed. On June 9, 1983, Special Agent Downing interviewed Norma Ginter after again advising her of her rights in writing.

The appellant claims that her statements should have been suppressed as the agents had no right to resume questioning once she had invoked her right to silence. The district court

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unwillingness to talk, the interrogation was terminated. Forty-eight hours elapsed before the officers resumed questioning again. Although each of the interrogations concerned Gordon Kahl and the June 3, 1983 shootout, this factor alone is not sufficient to find a violation of Ginter's constitutional rights. *See Jackson, supra,* 730 F.2d at 1179-80; *United States v. Finch,* 557 F.2d 1234, 1236 (8th Cir.), *cert. denied,* 434 U.S. 927 (1977). Accordingly, we hold that the motion to suppress was properly denied.

Finally, Mr. Ginter claims that the district court erred in not suppressing a statement he made to law enforcement authorities at the time of his arrest. It is clear that the statement was voluntarily made by the defendant after he had been informed of his *Miranda* rights. The district court's finding that "Leonard Ginter was anxious to speak his piece." was not clearly erroneous. *See McGlynn, supra,* 671 F.2d at 1143. Accordingly, his motion to suppress was properly denied.

D. Expert Testimony

At trial the defendants attempted to present testimony of an

arson investigator and a chemical analyst, whom they had hired to investigate the source and cause of the fire at the Ginter residence. They assert that such testimony would have shown that government agents intentionally destroyed fingerprint evidence of the burned body taken from the residence. The district court excluded the testimony, and the defendants assert that the court erred in this regard.

The admission or exclusion of expert testimony is a matter within the sound discretion of the district court. *See United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984). The district court did not abuse its discretion in excluding the proffered testimony, as it does not appear to have been germane to any issue at trial.

A review of the trial transcript reveals that the defendants did not claim that the govenment intentionally destroyed Gordon Kahl's fingerprints. Rather, their claim was that certain government documents were relevant to show that the authorities caused the fire. The district court held that only exculpatory evidence was relevant, and that the documents sought were not exculpatory.[6] *See United States v. Peltier*, 731 F.2d 550 (8th Cir. (1984). Subsequently, after the district court refused to accept certain expert testimony proffered by the defendants pertaining to to the government's conduct regarding the fire, an offer of proof was made.[7] That offer of proof is void of any indication that the law enforcement authorities intentionally destroyed fingerprint evidence; the offer went only to the cause of the fire. This testimony was not relevant to any issue at trial. Accordingly, the district court did not abuse his discretion in this regard.

---

[6]The district court also noted that the destruction of the fingerprints by the fire potentially served to aid the defendants because it made it more difficult for the government to establish the identification of the corpse.

[7]In addition to appellant Russell's offer in this record, the Ginters made an offer of proof regarding a local marshal's testimony as to the cause of the blaze. Although they delineate this issue in the statement of issues contained in their brief, they do not provide the court with any argument in support of this contention. Therefore, the issue was not properly presented to this court. See FED. R. APP. P. 28 (a) (4).

E. Counsel of Choice

The Ginters are indigent and were therefore appointed counsel. On October 11, 1983, they filled a motion for counsel of their choice in order to obtain someone who shared their beliefs about this country's tax laws. The district court did not grant their request. Appellants claim that the court erred in this regard.

In *United States v. Weninger*, 624 F.2d 163 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980), the court addressed a similar argument and held:

> The record indicates that Weninger had no intention of hiring a lawyer unless the lawyer agreed with his views about the invalidity of the tax laws. However, the right to assistance of counsel does not imply the absolute right to counsel on one's choice.

624 F.2d at 166. *See also Grady v. United States*, 715, F.2d 402, 404 (8th Cir. 1983). On this basis, we believe that the appellants' claim is without merit.

F. Exclusion of Ginters' Statements to Police

At trial Mr. and Mrs. Ginter sought to call law enforcement officers to the stand to testify as to certain exculpatory comments the defendant had made to the officers after their arrest. The statements were disallowed as hearsay. They now claim the district court erred in not allowing the testimony, as it fell within the exceptions to the hearsay rule. We reject the defendants' arguments.

Leonard Ginter relies on FED. R. EVID. 803 (3), which provides as a hearsay exception "[a] statement of the declarant's then existing state of mind, emotion * * *." Any evidence of Leonard Ginter's existing state of mind or emotion on June 5, 1983, the date the allegedly exculpatory statement was made, clearly was not relevant to the charges in the indictment which concerned the events of June 3, 1983. See FED. R. EVID. 401. This is buttressed by the Advisory Committee Notes to Rule 803(3), which state that his exception is a specialized application of the present sense impression exception contained in Rule 803(1).

Both defendants claim their statements were admissible under FED. R. EVID 804(b)(3), as declarations against interest. They assert that they were unavailable as witnesses, as required by the

rule, because of their fifth amendment privilege not to testify. *See Walker v. Lockhart*, No. 81-1700 slip op. at 4 (8th Cir. June 13, 1984) (Arnold, J., concurring). However, 804(a)(1) defines "unavailability as a witness" as the situation in which the declarant is exempted by ruling of the court on the ground of privilege. As the Advisory Committee Notes state: "[a] ruling by the judge is required, which clearly implies that an actual claim of privilege must be made." The record in this case reflects neither a claim of privilege, nor a ruling by the court.

Finally, we note that the offers of proof with respect to the officers' testimony failed to establish that the statements were inculpatory. The evidence would have shown that the Ginters planned to negotiate the surrender of Kahl in another week. Given the overwhelming evidence in this case, we do not believe the exclusion of this evidence affected the outcome of the trial. To the contrary, any error committed was harmless beyond a reasonable doubt. See FED. R. CRIM. P. 52(a)

G. Sentence

Udey challenges the harshness of his sentence. Udey's five year sentence was within the statutory limit for the offense committed. A sentence within the statutory limits is generally not disturbed *United States v. Caspers*, No. 83-2597, slip op. at 7 (8th Cir. June 20, 1984). Absent an abuse of discretion "[t]his court will not substitute its judgement for the discretion committed solely to the district court." *United v. Roth*, No. 83-1983, slip op. at 13 (8th Cir. June 12, 1984). The district court did not abuse its discretion in this case.

CONCLUSION

We have examined the appelants' remaining arguments and find them to be without merit.[8] Accordingly, the convictions are affirmed.

---

[8]There are several other issues raised in the appellants' briefs, but they fail to set forth any arguments in support of many of these contentions, as required by FED. R. APP. P. 28(a)(4). As to these arguments, the court expresses no judgement, but instead notes that "[w]e are not required to search the record for error.' as that burden is on the party alleging such. *Holt v. Sarver*, 442 F.2d 304, 307 (8th Cir. 1971).

LAY, Chief Judge, concurring and dissenting.

I concur in the majority's holding that there was sufficient evidence to sustain the convictions of defendants Russell and Ginter. I also agree that the alleged procedural and constitutional errors were harmless and did not prejudice Russell and Ginter's trial.

I cannot, however, agree that sufficient evidence exists to convict Edwin Udey of harboring or concealing fugitive Gordon Kahl in violation of 18 U.S.C. § 371 (1982).

The record does not provide adequate support for the majority's factual inferences and conclusions surrounding Udey's involvement in either the conspiracy or the actual harboring and concealing of Kahl. The majority states that Robertson's testimony "unequivocally place[s] Udey at Russell's home before, during, and after the FBI 'closing in' comment." Robertson testified only that she believed Udey entered the motor home with Ginter and Kahl. No testimony revealed what was discussed. As shown in the portion of the record quoted in the majority opinion, the remark describing the FBI as "closing in" did not occur in the motor home, but in Russell's house. Robertson was present at this conversation. She did not identify Mr. Udey as present at or taking part in the discussion.[1] In fact, on cross-examination, Robertson testified that only Wade, Ginter, and Kahl participated in the May 30th conversation:

> Q. I would like to bring you back to that portion of your sworn under oath testimony about the conversation at your father's house with the gentleman you have identified to this jury as Gordon Kahl in which there was talk that the FBI was closing in. Was it the talk that the FBI was closing in on Mr. Gordon Kahl?
>
> * * *
>
> Q. Okay. Please tell me who was having this conversation.
>
> A. I believe that it was Mr. Wade, Mr. Ginter, and Mr. Kahl.

---

[1] In all due respect, the majority misstates the record when it says that "Karen Robertson testified that Mr. Udey was present during a May 30th discussion * * *."

Q. You're not certain?

A. I do not believe my father [Russell] was entered into this conversation.

* * *

Q. During this discussion that you had about --- well, that you've testified under oath that Bill Wade, Mr. Ginter and your Gordon were having conversation about the FBI closing in, was this conversation true? Was the FBI closing in or do you have any knowledge of that?

A. I didn't have knowledge of it at the time, no. I did not know whether the FBI was closing in or not.

Q. Didn't you participate in that conversation?

A. I was standing there, yes.

* * *

Q. Was Edwin Udey present at that time?

A. No, sir.

* * *

Q. What did you hear Edwin Udey plan about any of this?

A. The only thing I know of Mr. Udey doing in this was inviting Mr. Kahl over for supper and coming over and getting him and taking him over for supper.

* * *

Q. This conspiracy, what part did you hear Edwin Udey play?

A. I have just stated.

Q. Other than this dinner that you've described, that's it; is that correct?

A. And Mr. Udey knew who he was and knew he was there.

Transcript at 395-414. Robertson thus clarified that Udey was not present at the alleged conversation concerning the FBI. The majority considers relevant Robertson's recollection that Udey's car was present at the Russell residence. The presence of Udey's car, however, does not show that Udey was part of the conversation regarding the progress of the FBI.

The government has the burden of proving Udey's guilt beyond a reasonable doubt. **All that has been proven is that Udey was**

associated with and in the presence of persons who did commit felonies. *Cf. United States v. Kelton*, 446 F.2d 669 (8th Cir. 1971) (holding that no predicate of proof existed to support the conviction of a defendant for wilfully aiding and abetting the commission of a bank robbery where there was no evidence to show that the defendant had engaged in some affirmative conduct in furtherance of the crime). As this court has stated: "Knowledge of the existence or acquisecence in a conspiracy does not serve to render one a part of the conspiracy. There must exist some element of affirmative cooperation or at least an agreement to cooperate." *United States v. Collins*, 552 F.2d 243, 245 (8th Cir.), *cert. denied*, 434 U.S. 870 (1977) *quoted in United States v. Brown*, 584 F.2d 252, 262, (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

Further, the prosecution must prove beyond a reasonable doubt that Udey knew a federal warrant had been issued for Kahl's arrest. 18 U.S.C. § 1071 (1982); *see United States v. Hogg*, 670 F.2d 1358 (4th Cir. 1982); 18 U.S.C. § 371 (1982). No evidence, circumstantial or otherwise, has proven beyond a reasonable doubt that Udey knew of the federal warrant issued for Gordon Kahl's arrest. Udey's reference to Kahl as "Curley" or "a hero" fails to show that Udey knew a federal warrant was outstanding for Kahl's arrest. An essential element of both the conspiracy and substantive offense of which Udey was convicted thus is not supported with sufficient evidence.

In light of Robertson's sworn testimony, the record fails to demonstrate sufficient evidence to prove beyond a reasonable doubt that Udey either conspired with Kahl, Ginter, and Russell to conceal and harbor a fugitive or actually did harbor Kahl. I cannot agree that the scant evidence showing Udey's association with his co-defendants and Kahl meets the onerous burden of proof the government must satisfy before it can send any individual, presumed to be innocent, to prison. Udey's conviction should be reversed. *Cf. United States v. Ward*, 703 F.2d 1058 (8th Cir. 1983) (holding that evidence of defendant's fingerprints on marijuana plantholders and evidence establishing defendant's connection with co-conspirators was insufficient to show knowing participation in marijuana growing scheme); *United States v.*

Brown, 584 F.2d 252 (8th Cir. 1978) (reversing despite considerable circumstantial evidence defendant's conviction or participation in conspiracy to distribute heroin because the evidence did not sufficiently establish defendant's participation).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 83-2615

United States of America,
Appellee,

v.

Ed Udey,
Appellant.

Order Denying Petition
for Rehearing En Banc.

Filed: December 28, 1984

ORDER

The majority of active judges have voted to deny the petition for rehearing en banc. The petition for rehearing en banc is hereby denied.

LAY, Chief Judge, HEANEY, BRIGHT and McMILLIAN, Circuit Judges, dissenting.

We dissent from the denial of the petition for rehearing en banc in the above entitled case. The defendant Udey was convicted for conspiracy to harbor and conceal fugitive Gordon Kahl and for the substantive offense of harboring and concealing him. He was sentenced to prison for five years on each count with the sentences to run concurrently. Although the majority sets forth several pieces of circumstantial evidence, it is undisputed that the testimony of Karen Robertson concerning a discussion held on May 30th is crucial to the affirmance of Udey's conviction. The majority contends that Robertson's testimony shows that Udey was present

during a discussion among Mr. Kahl and other defendants in which it was said that the F.B.I. "was closing in." The evidence is undisputed that on May 30th Gordon Kahl was present at the Arthur Russell home. Karen Robertson, the daughter of Mr. Russell, testified on direct examination concerning Udey as follows:

> A. I had some stuff in the back of my pickup that I needed to unload and Mr. Ginter and Mr. Udey were at the house and I went to get gas and unload the pickup. And when I was leaving, they all went into the motor home to talk.
>
> Q. Now, when you say, "they all went in the motor home to talk," name the people you're talking about, please.
>
> A. Mr. Kahl and Mr. Ginter and, I believe, Mr. Udey also.
>
> * * *
>
> Q. Now, you say that these people had a conversation there at your father's house on this occasion. Did you overhear any of that conversation?
>
> A. Just that they thought the F.B.I. was closing in. That's --

Mr. Udey was convicted because the prosecutor asked Karen Robertson whether "these people had a conversation there at your father's house on this occasion." The majority infers that "these people" included Mr. Udey. The fundamental question is whether Karen Robertson intended to include Udey in on that conversation. She admittedly was present at the time.

On cross-examination Robertson was asked specifically the following:

> Q. Okay. Please tell me who was having this conversation.
>
> A. I believe that it was Mr. Wade, Mr. Ginter and Mr. Kahl.
>
> * * *
>
> Q. Didn't you participate in that conversation?
>
> A. I was standing there, yes.
>
> * * *
>
> Q. Was Edwin Udey present at that time?

A. No, sir.

* * *

Q. What did you hear Edwin Udey plan about any of this?

A. The only thing I know of Mr. Udey doing in this was inviting Mr. Kahl over for supper and coming over and getting him and taking him over for supper.

* * *

Q. This conspiracy, what part did you hear Edwin Udey play?

A. I have just stated.

It is difficult for us to believe that a defendant may be sentenced to five years in prison because of an ambiguous leading question on direct examination which is later clarified by the witness so as to exclude the defendant from any incriminating conversation.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States of America vs

DEFENDANT: Ed Udey

APPENDIX C

United States District Court
WESTERN DISTRICT OF ARKANSAS
Harrison Division
DOCKET NO. 83-30009-04

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (Rev. 12/81)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: November, DAY: 29, YEAR: 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL Mr. Michael Minns
(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Conspiracy to Harbor and Conceal person from arrest and aiding and abetting, as charged in Count I of the Indictment in violation of 18 U.S.C. 371 and 2.

Harboring and concealing person from arrest, as charged in Count II of the Indictment in violation of 18 U.S.C. 1071.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, on Count I.

IT IS ADJUDGED that on count two that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years. The said sentence on count II is to run concurrently with the sentence on Count I.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE 11/29/83
BY Sallie Thompson (X) CLERK ( ) DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

H. Franklin Waters
H. Franklin Waters
Date 11-29-83

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 83-2615

United States of America,
Appellee,

v.

Ed Udey,
Appellant.

MOTION FOR A STAY OF THE ISSUANCE OF THE MANDATE

COMES NOW, Edwin C. Udey, Appellant herein, requesting that this Honorable Court stay the mandate in the above referenced cause of action, and in support of same would show this Honorable Court the following:

I.

The Appellant requests a stay from the mandate of this Court and begs leave to remain free pending his Petition for Writ of Certiorari, with the Supreme Court of the United States.

II.

Appellant will request review by the Supreme Court of the United States of the position of the Eighth Circuit as reflected in its original opinion and the decision to deny En Banc hearing.

III.

Appellant has heretofore faithfully appeared at all times required and has complied with all requirements of his bond. Appellant is in excess of seventy (70) years of age and lives in his homestead in Arkansas on Social Security with his wife, Irene Udey.

IV.

Although most cases are not accepted for review by the Supreme Court, in light of the constitutional arguments raised by the co-defendants and adopted by the Appellant, in light of the strong dissent endorsed by four (4) members of this Court, Appellant should remain at liberty until he completes that last leg of his legal journey which certainly has merit and certainly has a possibility of being reviewed by the Supreme Court with ultimate reversal.

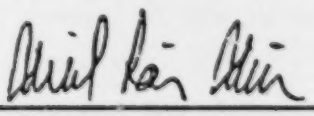
V.

The new conspiracy position on harboring by the Eighth Circuit appears to have abandoned its previous position as the forerunner of constitutional association protection and adopted the most liberal construction of the harboring statute to allow the most latitude for prosecution of any circuit. This position conflicts with prior Eighth Circuit law and other jurisdictions. It is an issue the Supreme Court will hopefully consider.

WHEREFORE PREMISES CONSIDERED, Appellant, Edwin C. Udey, requests this stay the mandate until the Supreme Court of the United States have either reversed or sustained or refused to hear this case.

Respectfully submitted,

MICHAEL LOUIS MINNS, P.L.C.

BY: 

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(2) (2) (1)

Nos. 84-1300, 84-1368, and 84-6333

Supreme Court, U.S.
FILED
MAY 23 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN C. UDEY, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR H. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

LEONARD G. GINTER AND NORMA GINTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the evidence against petitioner Udey was sufficient.

2. Whether petitioner Udey was prejudiced by the district court's rulings with respect to various incidents that occurred at trial.

3. Whether the district court erred in excluding proof as to whether evidence was destroyed in bad faith by the government (petitioners Udey and Russell).

4. Whether petitioner Russell's concurrent sentences for conspiracy to harbor a fugitive and the substantive offense of harboring a fugitive violate the Double Jeopardy Clause.

5. Whether petitioner Russell has standing to seek the suppression of evidence based on an alleged violation of petitioner Leonard Ginter's *Miranda* rights.

6. Whether evidence seized during a search of the burned remains of the Ginters' house, which had been the scene of a shootout with authorities, should have been suppressed (petitioners Leonard and Norma Ginter).

7. Whether the *Miranda* rights of petitioners Leonard and Norma Ginter were violated.

8. Whether the district court erred in its evidentiary ruling that petitioners Leonard and Norma Ginter were not entitled to introduce their post-arrest statements.

9. Whether petitioners Leonard and Norma Ginter were entitled to the appointment of counsel of their choice.

10. Whether the district court abused its discretion in refusing to grant a continuance (petitioners Leonard and Norma Ginter).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1300

EDWIN C. UDEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1368

ARTHUR H. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-6333

LEONARD G. GINTER AND NORMA GINTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported at 748 F.2d 1231.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1984. Petitions for rehearing were denied on December 28, 1984 (Udey Pet. App. B1-B3; Russell Pet. App. 29a; Ginters Pet. App. D1). Udey's petition for a writ of certiorari was filed on February 13, 1985; Russell's and the Ginters' petitions were filed on February 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Arkansas, each petitioner was convicted on one count of conspiracy to harbor and conceal a fugitive, in violation of 18 U.S.C. 371, and on one count of harboring and concealing a fugitive, in violation of 18 U.S.C. 1071. Petitioners Udey and Leonard Ginter were each sentenced to concurrent five-year terms of imprisonment. Petitioner Russell was sentenced to a six-month term of imprisonment and a four-year term of probation. Petitioner Norma Ginter was sentenced to a term of imprisonment of time already served and a five-year term of probation. The court of appeals affirmed (Pet. App. 1a-28a).

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the Russell petition (No. 84-1368). The appendix to the Udey petition (No. 84-1300) is incomplete in several respects.

The charges in this case involve the harboring and concealment of Gordon Kahl. Kahl was a tax protester and a member of an extremist organization known as Posse Comitatus. In 1977, Kahl was convicted of income tax violations. Following a period of incarceration, he was released on probation in 1979. It was subsequently alleged that Kahl violated the terms of his probation, and in March 1981 a United States Marshal made an unsuccessful attempt to persuade him to surrender voluntarily. Subsequent attempts to arrest Kahl also proved unsuccessful.

On February 13, 1983, the local sheriff spotted Kahl in Medina, North Dakota. The United States Marshal was contacted and a roadblock was set up to intercept Kahl and his companions. When Kahl's group encountered the roadblock, a shootout ensued in which the United States Marshal and one of his deputies were killed; in addition, a second deputy marshal, a county sheriff, and a city police officer were injured. Kahl escaped, but his associates were arrested and convicted on various charges arising from the February 13 shootout. See *United States* v. *Faul*, 748 F.2d 1204 (8th Cir. 1984), petitions for cert. pending, Nos. 84-1373, 84-6332, and 84-6350.[2]

After Kahl escaped, warrants for his arrest on charges of murder were issued on February 14 and March 11, 1983. A nationwide manhunt for Kahl was begun, and the shootout and search were the subjects of extensive media coverage. *Faul*, 748 F.2d at 1212; Pet. App. 2a-3a.

On March 13, Kahl moved into the residence of petitioner Russell in Mountain Home, Arkansas. Kahl stayed with Russell until May 30, 1983. Dur-

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[2] The foregoing facts were taken from the court's opinion in *Faul*, 748 F.2d at 1207-1210.

ing this period, Kahl had frequent discussions with Russell and Russell's daughter, Karen Robertson,[3] regarding the shootout in North Dakota. They also watched television news accounts of the search for Kahl. Pet. App. 3a.

While Kahl was staying with Russell, petitioner Udey visited the Russell residence. On his first visit, Udey referred to Kahl as a hero. In addition, on at least two occasions Kahl went to the Udey residence near Cotter, Arkansas. One of these visits was initiated when Udey invited Kahl to dinner. Pet. App. 3a.

In mid-May 1983, petitioners Leonard and Norma Ginter went to the Russell residence. They had an FBI wanted poster of Kahl, which they discussed with him. On May 30, the Ginters and Udey were again present at the Russell residence. At that time, there was a discussion that the FBI was "closing in" on Kahl. Later that day, Kahl moved to the Ginters' residence near Smithville, Arkansas. Pet. App. 3a.

On June 3, law enforcement authorities went to the Ginter residence in search of Kahl. A shootout then occurred, and the Ginters' home was burned down in the course of the gunfight. In the charred rubble, authorities recovered the remains of a rifle similar to one Kahl had at the Russell residence and a shotgun from the United States Marshal's office in North Dakota that had been missing since the February 13 shootout. In addition, they found the burned remains of a body, which was later identified by the medical examiner as Gordon Kahl. Pet. App. 3a-4a.

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[3] Robertson was the government's principal witness at trial.

ARGUMENT

1. Petitioner Udey contends (Pet. 5-22) that the evidence was insufficient to establish that he knew that a federal warrant had been issued for Kahl's arrest. This fact-bound claim was rejected by both courts below and does not call for further review. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).[4]

In any event, the courts below correctly found that the evidence was sufficient.[5] The only element disputed by Udey is whether he had knowledge that

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[4] As Udey notes (Pet. 5), the district court stated that the evidence against Udey was not as strong as it was against the other defendants. The district court specifically concluded, however, that the evidence was sufficient to support the jury's verdict (Sentencing Tr. 24):

> The [c]ourt believes that Mr. Udey was involved in this * * *.
>
> * * * * *
>
> [T]he jury had no difficulty, apparently, in believing that Mr. Udey, beyond a reasonable doubt, did the things with which he is charged. Very frankly, Mr. Udey, the court has no difficulty believing that either * * *.

In addition, Udey's five-year sentence indicates the district court's assessment of his involvement and culpability in the harboring scheme. Finally, we note that the district court entered a judgment of acquittal with respect to Udey's wife, Irene, at the close of the government's case; this determination by the district court concerning Udey's wife, and its contrary determination concerning Udey himself, reinforces the court's conclusion that the evidence against Udey was sufficient.

[5] Chief Judge Lay dissented from the panel's decision on this issue (Pet. App. 25a-28a). In addition, he and three other judges dissented from the denial of rehearing en banc in this respect (Udey Pet. App. B1-B3).

Kahl was a fugitive because a federal warrant had been issued for his arrest. However,

> rarely would direct proof of knowledge [of the existence of a warrant] be available. * * * The knowledge element can be established by evidence from which the trier of fact "could properly infer knowledge and guilt beyond a reasonable doubt."

United States v. *Bissonette*, 586 F.2d 73, 77 (8th Cir. 1978), quoting *United States* v. *Giampa*, 290 F.2d 83, 84-85 (2d Cir. 1961); cf. *Liparota* v. *United States*, No. 84-5108 (May 13, 1985), slip op. 14. Viewed in the light most favorable to the government,[6] the evidence adequately supports the jury's findings of Udey's knowledge.

First, there was widespread media coverage of both the shootout in North Dakota and the subsequent search for Kahl. This publicity extended to the area in Arkansas in which Udey lived. See pages 3-4, *supra*; Tr. 185, 199; Gov't Exhs. 3, 3A. Indeed, Udey acknowledges (Pet. 17) that he was aware of rumors and media reports concerning Kahl.

Moreover, Udey's actions afforded a sufficient basis for the jury to infer his knowledge that Kahl was a fugitive. When Udey first met Kahl at the Russell residence, Udey said to Kahl "[y]ou're a hero" and called him by the same nickname that Russell used (Tr. 295, 308). Following the shootout at the Ginter residence on June 3, Udey told Karen Robertson that Kahl was a "good patriot" (Tr. 325) but had shot the sheriff (Tr. 326, 406). And even after the June 3 shootout, Udey expressed no surprise about Kahl's

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[6] See, *e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 317-319, 324, 326 (1979); *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

identity or status as a fugitive. In addition, Udey wrote the name "Gordon Kahl" in his Bible and made the notation "Gordon Kahl delivered" next to the passage describing St. Peter's release from Herod's prison shortly before his scheduled execution (Tr. 988-989, 994; Gov't Exh. 12).

Finally, Udey was closely involved both with Kahl and with the co-defendants engaged in harboring and concealing Kahl.[7] For example, Udey visited the Russell residence on more than one occasion while Kahl was living there and was present on the day that Kahl left to move in with the Ginters (Tr. 307, 322). Likewise, Kahl went to Udey's residence at least twice, including once in response to a dinner invitation that Udey made to Kahl and to Russell and the Ginters (Tr. 308-309, 413; Gov't Exh. 9). Contrary to Udey's contention, this evidence goes well beyond "mere association" and provides additional support for the jury's finding.

In challenging the sufficiency of the evidence, Udey places great reliance (Pet. 16-20) on an asserted ambiguity in Robertson's testimony. As the court of appeals recognized (Pet. App. 7a-9a), Robertson's direct testimony stated that Udey was involved in a discussion with Kahl and Leonard Ginter about the fact that the FBI was closing in on Kahl and that Kahl would have to leave the Russell residence;[8] this testimony provides compelling evidence of Udey's

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[7] Udey concedes (Pet. 11) that "there was extremely convincing evidence that some of the conspirators knew of the warrant [for Kahl's arrest]."

[8] This discussion occurred on the day that Kahl moved out of the Russell residence and went to live with the Ginters.

knowledge that Kahl was a fugitive.[9] Moreover, even if Udey is correct that cross-examination raised an ambiguity concerning his presence during that conversation, the jury remained free to credit Robertson's direct testimony that he was there. And at all events, for the reasons discussed above, the evidence was sufficient without regard to this testimony to allow the jury to infer Udey's knowledge of the existence of an arrest warrant for Kahl.

2. Udey argues (Pet. 28-38) that various incidents at trial constituted prejudicial error. The court of appeals summarily rejected these claims as being "without merit" (Pet. App. 24a).[10] The decision below is correct, and review by this Court is not warranted.

a. The first challenged incident involved a drawing, made by Kahl on Russell's stationery, that contained religious and racial references. Over Udey's objection that these references were prejudicial, the drawing was admitted into evidence (Gov't Exh. 8). However, as the government stated in its brief in the court of appeals (at 24), the drawing was never described or shown to the jury. See also Udey Pet. 29-30. Because the exhibit was never published to the jury, it could not have prejudiced Udey's right to a fair trial.

b. The second incident involved an allegation that a woman on the jury panel winked at the deputy marshal during voir dire. Udey complains that he

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[9] Robertson also specifically testified (Tr. 414; see Udey Pet. 19) that Udey "knew who he [Kahl] was and knew he was there [at the Russell residence]."

[10] On this and all of the subsequent questions presented by petitioners, the decision of the court of appeals was unanimous, and no judge voted in favor of rehearing en banc.

was required to use a peremptory challenge to remove that juror and thus could not strike other jurors whom he deemed unacceptable. The district court found the winking incident to be insignificant (see Udey Pet. 31). The trial court has broad discretion in the selection of jurors, and Udey has not shown either an abuse of that discretion or an impairment of his right to a fair trial. See, *e.g.*, *United States* v. *Apodaca*, 666 F.2d 89, 94-95 (5th Cir.), cert. denied, 459 U.S. 823 (1982); *United States* v. *Archie*, 656 F.2d 1253, 1259 (8th Cir. 1981), cert. denied, 455 U.S. 951 (1982).

c. During voir dire, the district court referred to public accounts alleging that the defendants were tax protesters. See Tr. 95; see also Udey Pet. 32. Udey contends that he was not a tax protester and therefore was prejudiced by the reference. However, the district court's statement was an appropriate means for eliciting from the venire panel any prejudice that might exist due to the political beliefs that underlay Kahl's crimes and the possible motives of the defendants for harboring him from law enforcement authorities. The court acted well within its broad discretion in the conduct of the voir dire (see, *e.g.*, *Ham* v. *South Carolina*, 409 U.S. 524, 527-528 (1973)) and did not deny Udey a fair trial.

d. Udey next argues that the district court erred in admitting hearsay evidence of statements by Kahl indicating that he would forceably resist arrest. See Tr. 222-223; see also Udey Pet. 33. The evidence was introduced to explain why a marshal had met with Kahl to discuss his surrender but had not endeavored to arrest him. Because this evidence was not admitted to "prove the truth of the matter asserted" (Fed. R. Evid. 801(c)), but instead was used

to demonstrate the basis for the marshal's decision not to arrest Kahl, Udey's hearsay objection is without merit. See, *e.g.*, *United States* v. *Hunt*, 749 F.2d 1078, 1084 (4th Cir. 1984), petition for cert. pending, No. 84-1481; *United States* v. *Scott*, 678 F.2d 606, 612 (5th Cir.), cert. denied, 459 U.S. 972 (1982); see also *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 4-5.

e. Udey also complains that a relative of petitioner Russell's was observed photographing members of the jury. Based on its questioning of the two jurors involved, the district court replaced one with an alternate and determined that no other prejudice had occurred. See Tr. 1252-1266; see also Udey Pet. 34-37. That determination fell well within the district court's discretion to deal with issues of possible irregularities involving members of the jury. See, *e.g.*, *Remmer* v. *United States*, 347 U.S. 227, 230 (1954).[11]

3. Petitioners Udey and Russell contend (Udey Pet. 22-28; Russell Pet. 11-27) that the district court erred in excluding defense testimony regarding the government's alleged bad faith destruction of evidence. This contention was correctly rejected by the court below.

The manhunt for Gordon Kahl ended when he was killed by law enforcement officers in a shootout at the Ginters' residence. During the shootout, the Ginter house was burned to the ground. The charred remains of Kahl were identified by the medical examiner from teeth found in the rubble. At trial, petitioners sought to present expert testimony indicat-

[11] Relying on the arguments to be made in the petitions of his co-defendants, Udey also asserts that media publicity and courthouse security procedures deprived him of a fair trial. However, the other petitions do not present or discuss this issue, and therefore it need not be considered by the Court.

ing that government agents deliberately set the fire at the Ginters' in order to destroy fingerprint evidence that could have been used to make a positive identification of Kahl. The district court refused to admit the proffered testimony.

Initially, as the district court noted (see Pet. App. 21a n.6), the loss of the fingerprints could have aided the defendants in this prosecution, since it made it more difficult for the government to establish the identity of the body found in the Ginters' residence. It is highly implausible to claim, as petitioners do, that the government would weaken its case at trial. Nor have petitioners demonstrated why the government would deliberately destroy evidence showing whether Kahl, the subject of an intensive nationwide search, was still alive and at large.

In any event, as the court of appeals explained (Pet. App. 21a-22a), petitioners' offer of proof failed to establish that the proffered testimony was relevant. At most, petitioner's submission tended to show that the authorities caused the fire in the course of the shootout, not that they deliberately sought to destroy Kahl's fingerprints. However, the cause of the fire was neither germane to the issues at trial nor exculpatory of the defendants.[12] Accordingly, this evidence was properly excluded.

As this Court has recognized, a district court "has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling* v. *United States*, 418 U.S. 87, 108 (1974). Here, petitioners' proffered testimony related to an issue entirely collateral to the charged offenses, which were established at trial by

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[12] Petitioner Udey concedes (Pet. 22) that there was "substantial and convincing evidence" that the corpse found in the Ginters' residence was that of Gordon Kahl.

proof whose sufficiency is unchallenged. In these circumstances, the district court did not abuse its discretion in excluding this defense evidence.[13]

4. Petitioner Russell received concurrent sentences of six months' imprisonment, to be followed by four years' probation, for the substantive offense of harboring a fugitive and for conspiracy to harbor a fugitive. He contends (Pet. 8-11) that this constituted multiple punishment in violation of the Double Jeopardy Clause. The court of appeals properly rejected this contention (Pet. App. 9a-11a).[14]

The Court has made clear that the propriety of cumulative punishments under the Double Jeopardy Clause is strictly a matter of legislative intent. See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 6 & n.8; *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 691-693 (1980). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature

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[13] The cases cited by petitioner are not to the contrary. See also *California* v. *Trombetta*, No. 83-305 (June 11, 1984). In those cases, the government destroyed documentary or other tangible evidence that was in its possession or control. In this case, by contrast, the government did not have custody of Kahl or the fingerprint evidence. Moreover, the government did not act to destroy the evidence of Kahl's fingerprints; rather, the fire occurred in the course of law enforcement activity designed to apprehend him. While petitioners may view that use of force as excessive, it plainly does not constitute bad faith destruction of evidence in the control of the government.

[14] Because petitioner was given concurrent sentences on the substantive and conspiracy counts, it is unnecessary for the Court to consider his double jeopardy claim. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

intended." *Missouri* v. *Hunter*, 459 U.S. at 366. Thus,

> the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Id. at 368, quoting *Albernaz*, 450 U.S. at 344 (footnote omitted).

In applying this standard, the Court "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 5. Under *Blockburger*, "[t]he appropriate inquiry * * * is 'whether each provision requires proof of a fact which the other does not.'" *Ball*, slip op. 5. The *Blockburger* test turns on the statutory elements of the offense and not on the allegations of the indictment or the government's proof at trial in a given case. See *Albernaz*, 450 U.S. at 337-338; *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

This Court [15] and the court of appeals [16] have consistently recognized that a substantive offense and a

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[15] See, *e.g.*, *Jeffers* v. *United States*, 432 U.S. 137, 156-157 (1977) (plurality opinion); *Iannelli*, 420 U.S. at 777-779, 785-786 n.17; *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); *Carter* v. *McClaughry*, 183 U.S. 365 (1902).

[16] See, *e.g.*, *United States* v. *Nichols*, 741 F.2d 767, 772-773 (5th Cir. 1984), cert. denied, No. 84-985 (Feb. 19, 1985);

conspiracy to commit that offense are generally different offenses that satisfy the *Blockburger* test. Here, conspiracy to harbor a fugitive involves the necessary element of an agreement to violate the law, which is not part of the substantive offense; conversely, the substantive offense of harboring a fugitive, unlike the conspiracy offense, requires the actual consummation of the crime. Thus, these substantive and conspiracy offenses meet the test of *Blockburger*. Moreover, Russell has pointed to nothing in the language, history, or purposes of the statutes to suggest that Congress intended to depart from the settled rule that "separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end." *Iannelli*, 420 U.S. at 777-778. On the contrary, "[t]he historical difference between the conspiracy and its end has led this Court consistently to attribute to Congress 'a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different'" (*id.* at 779 (citation omitted)).[17] Accordingly, Rus-

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United States v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Bosch*, 584 F.2d 1113, 1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 918-920 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Inmon*, 568 F.2d 326, 329-333 (3d Cir. 1977); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Ricco*, 549 F.2d 264, 272-273 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791-792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

[17] *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976), upon which Russell relies, does not conflict with this analysis. *Austin* concerned convictions for bribery and for conspiracy

sell's sentences for the substantive and conspiracy offenses were not improper.[18]

5. Russell also argues (Pet. 5-8) that it was prejudicial error for the district court to admit co-defendant Leonard Ginter's statement that he had harbored Kahl. He argues that the statement was obtained in violation of Ginter's rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

Russell's objection to the introduction of Ginter's statement is insubstantial. The Fifth Amendment right against compelled self-incrimination is a "personal privilege" (*Fisher* v. *United States*, 425 U.S. 391, 398 (1976)), and "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted *on the person asserting the privilege*" (*id.* at 397 (emphasis added and citation omitted)). Just as the Fifth

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to engage in bribery. In that limited circumstance, the court concluded that the substantive and conspiracy offenses were the same because each involved "the same concert of action or agreement" (529 F.2d at 563). Cf. *Iannelli*, 420 U.S. at 773, 779, 782-786 (Wharton's Rule). The Sixth Circuit has confined *Austin* to that narrow situation in which the substantive offense, like the conspiracy, entails an agreement as a necessary element. See *United States* v. *Fife*, 573 F.2d 369, 372-373 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977); see also *United States* v. *Bankston*, 603 F.2d 528, 534 n.7 (5th Cir. 1979); *United States* v. *Cowart*, 595 F.2d 1023, 1033 n.14 (5th Cir. 1979). Because Russell's offense of harboring Kahl did not require any agreement or concerted action with his co-defendants, the decision in *Austin* is inapposite.

[18] There is also no basis for Russell's suggestion (Pet. 11) that offenses cannot be brought together in a single prosecution if they would not be subject to cumulative penalties. See *Ball*, slip op. 4-5 & nn.7, 8.

Amendment does not protect a person from being required to incriminate a third party (*id.* at 398), so too a third party cannot invoke someone else's privilege against self-incrimination as a basis for seeking to suppress evidence obtained in alleged violation of that person's rights. See, *e.g.*, *United States* v. *Salinas-Calderon*, 728 F.2d 1298, 1302 (10th Cir. 1984); *United States* v. *Lopez*, 709 F.2d 742, 745 n.3 (1st Cir.), cert. denied, 464 U.S. 861 (1983); *United States* v. *Penn*, 647 F.2d 876, 884 (9th Cir.), cert. denied, 449 U.S. 903 (1980). Accordingly, Russell was not entitled to challenge the validity of Ginter's statement under *Miranda*.

6. Petitioners Leonard and Norma Ginter contend (Pet. 15-30) that the evidence seized during the search of their burned-out house should have been suppressed because the warrant authorizing the search was issued without probable cause. This claim does not call for further review.

First, the validity of the search does not depend upon the challenged warrant. Although law enforcement officials went to the Ginters' residence to execute the warrant, no search occurred at that time because of the gunshots that were fired from inside the house. Rather, a search was conducted only after the shoot-out had ended and the building had burned down. As the court of appeals correctly recognized (Pet. App. 15a-16a), the entry into the charred remains of the crime scene was fully justified by exigent circumstances wholly without regard to the warrant, and the evidence of Kahl's body and his rifle, which were found in plain view, was properly seized. See *Thompson* v. *Louisiana*, No. 83-6775 (Nov. 26, 1984), slip op. 2, 4; *Mincey* v. *Arizona*, 437 U.S. 385, 392 (1978); *Michigan* v. *Tyler*, 436 U.S. 499, 509-510

(1978); *United States* v. *Singer*, 687 F.2d 1135, 1144 (1982), aff'd in relevant part, 710 F.2d 431, 432 (8th Cir. 1983) (en banc). Accordingly, even assuming that the Ginters retained a reasonable and legitimate expectation of privacy in the incinerated rubble of their house, the Fourth Amendment was not violated.[19]

In any event, the court of appeals correctly upheld the warrant issued by the magistrate for the search of the Ginters' residence (Pet. App. 12a-15a). Briefly stated, the affidavit in support of the warrant application disclosed information from a reliable informant that the informant had seen Kahl with the Ginters in a particular color and type of car on May 30, 1983, four days before the shootout and search took place. It also stated that the informant's tip had been corroborated by aerial surveillance, which showed that a car of the given description was at the Ginters' house on the afternoon of June 2 and the morning of June 3. These facts, viewed in a common-sense fashion in the overall context, provided a " 'substantial basis for * * * [the issuing magistrate to] conclud[e] that a search would uncover evidence of wrongdoing' " (*Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (citation omitted)) and demonstrated "a fair probability that * * * [the evidence sought would] be found" (*id.* at 238).[20]

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[19] A shotgun was also found during a search on the following day. The court of appeals held (Pet. App. 16a) that even if this search was not supported by exigent circumstances at the crime scene, any error in the admission of the evidence was harmless beyond a reasonable doubt. The Ginters have not challenged this harmless-error ruling.

[20] The Ginters contend (Pet. 15-18) that *Gates* should not be applied to searches, such as the one in this case, that occurred

7. Leonard and Norma Ginter argue (Pet. 31-34) that certain statements were obtained in violation of their rights under *Miranda* v. *Arizona*, *supra*, and therefore should have been suppressed. These arguments do not warrant this Court's review.

a. When the police arrived at the Ginters' home, Norma Ginter was inside. Leonard Ginter was stopped by the officers outside the house as he was driving away. At the officers' direction, Leonard called for Norma to come outside. When she did so, the officers asked the Ginters whether there was anyone else inside the house. After they responded that there was not, the sheriff entered the house. Kahl, who was hiding inside, shot and killed the sheriff (Tr. 326, 406).

The Ginters claim that their response to the officers should have been suppressed because they were not first advised of their *Miranda* rights. As they concede (Pet. 32), however, this issue was not presented in the motion to suppress, and thus the court of appeals correctly held (Pet. App. 17a) that it was not preserved under Fed. R. Crim. P. 12(b). In any event, as the court of appeals noted in the alternative (Pet. App. 17a n.4) and as petitioners appear to acknowledge (Pet. 33), the officers' questions were proper- -and hence the responses were admissible—in order "to secure [the officers'] safety [and] the safety

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before the date of that decision. They acknowledge (Pet. 18), however, that their position has been rejected by the courts of appeals and that no conflict exists on the issue. Furthermore, there is no consideration of unfairness or systemic reliance to suggest that the Court's construction of the Fourth Amendment in *Gates* should be inapplicable here and that the relevant and reliable evidence in question should be excluded at trial.

of the public." *New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 9.

b. Shortly after her arrest on June 3, Norma Ginter was advised of her *Miranda* rights and invoked her right to remain silent. The following morning, she was again advised of her rights and gave a statement, which she acknowledged at the suppression hearing was not coerced; this statement was not introduced at trial. Four days after her arrest, petitioner was again given *Miranda* warnings and declined to answer any questions. On June 9, six days after her arrest, she was once more advised of her rights and made a second statement. Petitioner contends that this statement, which was admitted into evidence at trial, violated *Miranda* and *Edwards* v. *Arizona*, *supra*.

The district court found that in each instance petitioner was fully advised of her *Miranda* rights, that her waiver of those rights was knowing and intelligent, and that the statement she made that the government introduced in evidence was voluntary (Pet. App. 18a-19a; see also Ginters Pet. 31). Moreover, the court found that petitioner did not ask to be provided with counsel but only indicated that she wished to remain silent; indeed, even in that regard, petitioner " 'never stated that she intended to make no statement ever, but rather equivocally advised the authorities that she did not want to talk to them at the particular time' " (Pet. App. 19a). In these circumstances, it is clear that the officers scrupulously honored petitioner's right to remain silent [21] and that their action in recontacting her, which occurred after

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[21] See *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975); *Miranda*, 384 U.S. at 479; *Jackson* v. *Wyrick*, 730 F.2d 1177, 1179 (8th Cir. 1984), cert. denied, No. 83-7000 (Oct. 1, 1984).

the passage of a substantial period of time and involved a new set of *Miranda* warnings, did not violate *Edwards*.

8. Following their arrests, the Ginters gave various statements to the authorities. Some of these statements were used against them at trial as admissions under Fed. R. Evid. 801(d)(2)(A). The Ginters contend (Pet. 35-38) that they were entitled to introduce their other post-arrest statements as defense evidence.

This claim is without merit. Petitioners' prior out-of-court statements that they sought to introduce were clearly hearsay. Moreover, contrary to petitioners' contention, the statements were not admissible under the hearsay exception for declarations against penal interest. See Fed. R. Evid. 804(b)(3).[22] As the court of appeals noted (Pet. App. 24a), petitioners' offers of proof failed to establish that the statements were inculpatory and hence against penal interest; indeed, by seeking to introduce them, petitioners presumably believed the statements to be exculpatory rather than incriminating.[23] Nor was

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[22] Petitioners no longer raise the argument, which the court of appeals rejected (Pet. App. 23a), that certain statements made several days after the shootout were relevant and admissible as evidence of their existing state of mind or present sense impression. See Fed. R. Evid. 803(3).

[23] Rule 804 further provides that a statement against interest is not admissible unless the declarant is unavailable as a witness at trial. While a third-party witness's invocation of the Fifth Amendment renders him unavailable for purposes of the Rule (see Fed. R. Evid. 804(a)(1)), it is not at all clear that a defendant who voluntarily elects to exercise his privilege not to testify should likewise be deemed to be unavailable; unlike the situation of the third-party witness, the

there any showing that the statements were necessary to make fair and complete the post-arrest statements that the government introduced. See Fed. R. Evid. 106; *United States* v. *Soures*, 736 F.2d 87, 91 (3d Cir. 1984); *United States* v. *Crosby*, 713 F.2d 1066, 1074 (5th Cir.), cert. denied, 464 U.S. 1001 (1983); *United States* v. *Marin*, 669 F.2d 73, 84-85 (2d Cir. 1982). Finally, as the court of appeals held as an alternative ground for decision (Pet. App. 24a), any alleged error in the exclusion of these statements was harmless beyond a reasonable doubt.

9. The Ginters assert (Pet. 39-40) that they were entitled to select the lawyer to be appointed to represent them. It is well-settled, however, that a defendant does not have a constitutional right to appointed counsel of his choice. See *Morris* v. *Slappy*, 461 U.S. 1, 13-14 (1983); *Grady* v. *United States*, 715 F.2d 402, 404 (8th Cir. 1983); *United States* v. *Peister*, 631 F.2d 658, 661 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States* v. *Brown*, 591 F.2d 307, 310 (5th Cir.), cert. denied, 442 U.S. 913 (1979); cf. *Ake* v. *Oklahoma*, No. 83-5424 (Feb. 26, 1985), slip op. 13-14. Accordingly, the court of appeals correctly rejected petitioners' claim (Pet. App. 22a).

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defendant seeking to introduce his prior statement on his own behalf has control over whether he will testify at trial. Cf. Fed. R. Evid. 804(a)(1) (last paragraph). The purpose and overall structure of the Rule suggest that it was designed to apply to statements of third-party witnesses, not to statements of parties who, in an effort to use their own out-of-court declarations, make themselves unavailable only in the sense that they elect not to testify.

10. Lastly, the Ginters contend (Pet. 41) that the district court abused its discretion in denying them a continuance of the federal trial so that they could first be tried on state murder charges arising out of the June 3 shootout at their house. This claim is unavailing.

This Court has recognized that trial courts have "broad discretion * * * on matters of continuances." *Morris* v. *Slappy*, 461 U.S. at 11; see also, *e.g.*, *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *United States* v. *Johnson*, 732 F.2d 379, 381 (4th Cir. 1984), cert. denied, No. 83-6953 (Nov. 26, 1984); *United States* v. *Wuagneux*, 683 F.2d 1343, 1355-1356 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). The exercise of that discretion will be reversed on appeal only if it is "unreasoning and arbitrary" (*Morris* v. *Slappy*, 461 U.S. at 11). Here, petitioners sought an essentially unlimited continuance until such time as the state proceeding had been completed.[24] Moreover, they did not represent that they would testify at the federal trial and were deterred from doing so only by the pendency of the state charges. Cf. *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984). Especially in view of the significant public interest in a prompt resolution of the federal indictment (see, *e.g.*, *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972)), the district court did not abuse its discretion in denying the Ginters' request for an indefinite continuance.

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[24] Indeed, at the time the government's brief was filed in the court of appeals in this case, the state trial had not yet taken place (see Gov't C.A. Br. 22).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1984

EDWIN C. UDEY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONSE TO GOVERNMENT'S BRIEF IN OPPOSITION

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Response to Opposition Statement

"Kahl was a tax protestor and a member of an extremist organization known as Posse Comitatus."

If this statement of the Government is true, it is totally unsupported by the record and is not referenced to the transcript.

The transcript of the case, *U.S. v. Faul,* (748 F.2d 1204) has not been provided to Petitioner and is not relevant to this case.

Almost the entire page 3 of the Government's "statement" is irrelevant to the issues before this Court. It is as if the Government wanted to press its guilt by association case to this Court. The Eighth Circuit also consolidated the cases for a back-to-back hearing in Omaha, Nebraska and the cases were published back to back.

The Government's position is that in addition to Udey's familiarity with others convicted of harboring Kahl, Udey was also present when a statement was made that the F.B.I. is closing in. (See Appellee's brief in opposition, page 4). The four (4) dissenters including Chief Justice Lay of the Eighth Circuit dispute this version, so does the record.

Response to Opposition Argument

1. The Government argues that this Court cannot reconsider the facts. As a general rule that is the case. In the instant case however, we have a fact situation clearly disputed by four (4) members of the Eighth Circuit and questioned by the trial Judge as possibly being inadequate.

The clear finding of guilt by association is a constitutional issue violating due process and the implied freedom of association of the First Amendment through the freedom to peaceably assemble.

The Government's assertion that "the only element disputed by Udey is whether he had knowledge that Kahl was a fugitive" is patently absurd. All other issues are obviously disputed. The raising of the issue regarding his knowledge of a warrant obviously also raises the issue

of his involvement in the act of harboring. If the Petitioner had no knowledge the man was a fugitive from the process of a Federal warrant, he could not have harbored the man.

The ". . . widespread media coverage of . . . events in North Dakota . . ." which extended into Arkansas' news as a minor story and which did not necessarily reach the Petitioner or reveal the Federal warrant, cannot be added to Udey's more substantial knowledge of Kahl obtained after the Arkansas fire which made Arkansas headlines, to allow speculation that Udey therefore knew *before* the Arkansas front page publicity that Kahl was a Federal fugitive as the term is defined by statute and case law. (See Petitioner's brief).

The Government in its argument has ignored the issue. The issue is:

A) Since the Eighth Circuit *standard* of proof is now different from its prior standard and different from all other circuits, how will this Court resolve this conflict between the circuits?

B) Is the finding of the Court of Appeals in light of the record unacceptable?

C) Does the First Amendment or any other constitutional guarantee protect freedom from guilt by association?

Robertson's direct testimony does not, as the Government maintains, say Udey was present at the time of "the F.B.I. is closing in" speech, it only leaves that open as a possibility, but regardless of the possibility when directly asked if Udey was present, she replies that he was not. (See dissenting opinion *U.S. v. Udey*, 748 F.2d 1231).

2. Argument Part II(A) is unsupported by the record. The stipulated "highly prejudicial" Exhibit Government "8" was admitted into evidence. If the Government now contends that it was not published to the jury, the Government must show how an admitted exhibit, admitted over Petitioner's strenuous objection and vigorous offer of stipulation to any potentially "relevant" facts, in a futile effort to exclude the exhibit, failed to reach the jury. The record does not reflect this.

Argument Part II(B) of the Government raises no new issues, but cites several cases which sometimes support Petitioner's position and other times are not relevant to the instant case.

Argument Part II(C). The Government's case is more nearly defeated by its citations than helped. The Government's cases cited in II(B) support Petitioner's position.

The Government's cited case, *Remmer v. United States*, 74 S.Ct. 450, supports Petitioner's position with regard to the photography session [Government argument II(e)] and the winking incident.

The winking incident was not investigated. The photography incident was investigated ex-parte. The Petitioner was not able to "listen to" the juror's explanations until receiving the appellate transcript and was never allowed to examine the jurors. *Remmer*, a Supreme Court decision, was reversed by the trial Court's actions.

3. The Government's third argument is harder to accept than its first. The Government first argues that the Petitioner, by raising the issue of lack of knowledge of a warrant, did not by this action also raise the issue of non-participation in a scheme to avoid the warrant.

Now the Government concedes the offer of proof denied to the jury by the trial Judge would have demonstrated F.B.I. sponsored arson, but that it is irrelevant since it does not also raise the issue that the intentional act of committing arson logically infers the arsonists intended the obvious result of their actions: the destruction of whatever was in the shelter, the object of the arson: a human body.

The Government, in a curious contrast in this case, first argues that the association and knowledge with harborers is sufficient circumstantial evidence to prove actual knowledge and assistance in a harboring conspiracy; while on the other hand, in the same case, the acts of arson by Government officials is not sufficient circumstantial evidence to show that by the act said officials intended, as the natural outcome of their act, to destroy everything in the shelter including the suspect's fingerprints. Perhaps the Government's explanation for the missing hands (with fingerprints) and feet would have been examined more skeptically, had the jury been apprised of the cause of the fire. The logical reason of the arson was to prevent the identification of the corpse that might not have been Gordon Kahl.

In any event, the Government urges that, since there was clear and convincing evidence by Government witnesses that the corpse was Kahl, why allow evidence which would cast aspersions on the Government witnesses' credibility and give the jury the option to find the Government's position not credible beyond a reasonable doubt? Reason: Because, absent evidence by both sides, you don't have an impartial jury or a fair trial. If all exculpatory evidence is omitted there will seldom be a case in which the incriminating evidence, no matter

how slight, will not be sufficient to sustain a conviction. The only thing missing is a witch burning at the stake, and we have come pretty close to that in the instant case.

Conclusion

For all of these reasons stated herein and in Petitioner's Brief, either a judgment of acquittal or a new trial for the Petitioner should be granted.

Respectfully submitted,

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